In the Privy Council.

No. 102 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

In the Matter of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact Section 498A of The Criminal Code, being Chapter 56 of the Statutes of Canada 1935.

Between

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA *Appellant*

and

THE ATTORNEY-GENERAL OF CANADA and THE ATTORNEYS-GENERAL of the PROVINCES of ONTARIO, QUEBEC, NEW BRUNSWICK, MANITOBA, ALBERTA and SASKATCHEWAN - - *Respondents.*

RECORD OF PROCEEDINGS.

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IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact Section 498A of The Criminal Code, being Chapter 56 of the Statutes of Canada 1935.

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RECORD OF PROCEEDINGS.

No. 1.

Order of Reference by Governor-General in Council.

No. 1. Order of Reference by Governor-General in Council, 5th November 1935.

P.C. 3451

CERTIFIED *to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor-General on the 5th day of November,* 1935.

The Committee of the Privy Council have had before them a report, dated 30th October, 1935, from the Minister of Justice, referring to an Act to amend the Criminal Code, being chapter 56 of the Statutes of Canada, 1935, and in particular to section 9 of the said Act, whereby the Criminal Code was amended by inserting therein after section 498 the following section :

" 498A. Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding

No. 1. Order of Referenceby Governor-General in Council, 5th November 1935 —*continued.*

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 or 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."

The Minister observes that said section 498A was enacted for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads but that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact this section, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act:

Is said section 498A of the Criminal Code, or any or what part or parts of the said section, ultra vires of the Parliament of Canada?

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

No. 2.

Order of Supreme Court of Canada for Inscription of References Nos. 1, 2, 3, 4, and 5, and Directions.

In the Supreme Court of Canada.

No. 2. Order for inscription of References and Directions, 14th November 1935.

IN THE SUPREME COURT OF CANADA.

Before The Right Honourable the Chief Justice of Canada.

Thursday, the 14th day of November, A.D. 1935.

IN THE MATTER of the questions referred to the Supreme Court of Canada as to whether the Parliament of Canada had legislative jurisdiction to enact

(*a*) Section 498A of the Criminal Code, being Chapter 56 of the Statutes of Canada, 1935;

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

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

(*d*) 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;

(*e*) 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.

Upon the application of the Attorney-General of Canada for directions as to the inscription for hearing of the cases relating to the questions herein referred by His Excellency the Governor-General in Council, for hearing and consideration by the Supreme Court of Canada pursuant to the provisions of section 55 of the Supreme Court Act, R.S.C. 1927, chapter 35; upon hearing read the Orders in Council, dated November 5, A.D. 1935, Nos. P.C. 3451, 3452, 3453, 3454 and 3460, respectively, setting forth the said questions; upon hearing read the affidavits of Charles P. Plaxton filed herein; and upon hearing what was alleged by counsel for the Attorney-General of Canada, and for the Attorneys-General of the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island, Manitoba, British Columbia, Saskatchewan and Alberta, respectively; the Attorney-General of the Province of Nova Scotia not being represented on such application, by counsel, although duly notified.

IT IS ORDERED that the said References be inscribed for hearing at the present sittings of this Honourable Court and be heard the 15th day of January A.D. 1936.

AND IT IS FURTHER ORDERED that the respective Attorneys-General of the several Provinces of Canada be notified of the hearing of the

In the Supreme Court of Canada.

argument upon the said References by sending to each of them by registered letter on or before the 1st day of December, A.D. 1935, a Notice of Hearing of the said References together with a copy of this Order.

No. 2. Order for inscription of References and Directions, 14th November 1935 —*continued.*

AND IT IS FURTHER ORDERED that one printed Case for all of the said References be filed on or before the 1st day of December, A.D. 1935, and that three copies thereof be delivered to the Ottawa Agents of the Attorneys-General of the several Provinces of Canada.

AND IT IS FURTHER ORDERED that the Attorney-General of Canada and the Attorneys-General of the several Provinces of Canada be at liberty to file separate factums of their respective arguments on each of said References, on or before the 10th day of January, A.D. 1936, and that the said Attorneys-General be at liberty to appear personally or by counsel upon the hearing of the said References.

(Sgd.) L. P. DUFF, C.J.

No. 3. Notice of hearing, 18th November 1935.

No. 3.

Notice of Hearing of References Nos. 1, 2, 3, 4 and 5.

IN THE SUPREME COURT OF CANADA.

IN THE MATTER of the questions referred to the Supreme Court of Canada as to whether the Parliament of Canada had legislative jurisdiction to enact

(*a*) Section 498A of the Criminal Code, being Chapter 56 of the Statutes of Canada, 1935;

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

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

(*d*) 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;

(*e*) 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

TAKE NOTICE that the References herein have, by order of the Right Honourable the Chief Justice of Canada, dated the 14th day of November, A.D. 1935, been inscribed for hearing at the present sittings of the Supreme Court of Canada, and to be heard on the 15th day of January, A.D. 1936; and you are hereby notified of the hearing of the said

References pursuant to the terms of the said Order, copy of which is hereto annexed.

Dated at Ottawa, this 18th day of November, 1935.

W. STUART EDWARDS
Solicitor for the Attorney-General of Canada.

To: The Attorneys-General
of the several Provinces of Canada.

In the Supreme Court of Canada.

No. 3. Notice of hearing, 18th November 1935 —*continued.*

No. 4.

Factum of the Attorney-General of Canada.

No. 4. Factum of the Attorney-General of Canada.

PART I

STATEMENT OF CASE.

1. By Order of His Excellency the Governor-General in Council, dated November 5th, 1935 (P.C. 3451) (Record p. 4), the following question was referred to the Supreme Court of Canada for hearing and consideration pursuant to section 55 of the Supreme Court Act:

> " Is said section 498 A of the Criminal Code, or any or what part or parts of the said section, ultra vires of the Parliament of Canada?"

2. The section was enacted by section 9 of chapter 56, 25–26 George V, for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads. (Order of Reference, Record p. 3.)

3. The Royal Commission on Price Spreads was appointed by Letters Patent under the Great Seal of Canada, dated the 7th day of July, 1934, under the provisions of Part I of the Inquiries Act, Revised Statutes of Canada, 1927, chapter 99, to continue, complete and report on the inquiry into certain matters referred to a Select Special Committee appointed by a Resolution of the House of Commons passed on February 2nd, 1934. (Report of Royal Commission on Price Spreads, p. xxvi.)

4. On the 9th day of April, 1935, the Royal Commission on Price Spreads made its report, which was duly presented to Parliament. The report, after recommending the establishment of the Federal Trade and Industry Commission provided at pages 269 and 270, as follows:

> " (1) *The Definition of Unfair Practices*
>
> Unfair competitive practices take many forms, some of which are now prohibited by law. In respect to those, the difficulty up to the present has been that there has been no administrative agency for the enforcement of such laws, and the prohibition has, therefore, not been effective. A business man is never anxious to proceed against his competitor for the violation of rules of business conduct, even though that violation may have been definitely illegal. We therefore recommend that the Trade and Industry Commission should, in the manner and to the extent previously recommended in

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No. 4. Factum of the Attorney-General of Canada—*continued.*

connection with consumer protection, supervise the enforcement of existing laws which prohibit certain business practices.

" There are, however, other competitive practices, which while not illegal, may be equally unfair. These take many forms, but the majority of them may be brought under the definition of unfair price discrimination; ' unfair,' because it operates inequitably as between competitors, because the burden of it is often pushed back to the wage-earner or primary producer, without corresponding benefits to the consumer, and because it deprives society of the benefits of fair and equal competition. Unfair price discrimination, or any other similarly unfair business practice, permits the survival of the powerful, rather than of the efficient. The Federal Trade and Industry Commission should be given the duty and power of prohibiting such unfair trade practices.

" We feel, further, that it would be unwise to attempt to write at present into statute law a rigid definition of what constitutes an unfair practice, with a list of such practices. Such a list, if appropriate at the present time, would probably soon be rendered obsolete by changing conditions. At the same time we recommend that the Act creating the Trade Commission and giving it power to prohibit unfair competition should establish certain principles for the determination of ' unfairness.' We recognize that there is a very real danger of confusing the economic, legal, and ethical implications of ' unfairness ' and we feel that this danger might be removed to some extent if certain general criteria were laid down in the Act. We suggest that practices should be prohibited as unfair which are characterized by bad faith, fraud, misrepresentation, or oppression; which are resorted to for the purpose of destroying competition or eliminating a competitor; which facilitate the development of monopoly; or which destroy fair competitive opportunity and prevent the survival of those who can organize and carry on the production of goods most efficiently. It is in this sense that the word ' unfair ' should be used in the Act.

" Without attempting to restrict the application of this test of ' unfairness ' by the Commission, we feel that certain practices which we have examined should very definitely be considered ' unfair ' under the Act. They are so widespread and generally condemned that their complete prohibition by the Commission is justified. We refer specifically to—

(1) discriminatory discounts, rebates and allowance,

(2) territorial price discrimination and predatory price-cutting."

5. Section 498A of the Criminal Code defines, prohibits and prescribes punishment for the unfair trade practices above specifically referred to, and provides as follows:

" 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."

6. The said chapter 56, 25–26 George V, was assented to on the 5th of July, 1935. On the same date the Dominion Trade and Industry Commission Act, 1935, was also assented to. Section 2 (*h*) of this last mentioned Act provides:

"2. (*h*) 'Laws prohibiting unfair trade practices' means the provisions of . . . . the Combines Investigation Act . . . and of sections 404, 405, 406, 415A and 486 to 504, inclusive, of the Criminal Code, and of this Act and regulations under the said Acts, which provisions prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest;"

Sections 20, 21 and 22 of this last mentioned Act make additional provisions for the prosecution of offenders against Section 498A of the Criminal Code.

PART II

Submission of the Attorney-General for Canada.

7. The Attorney-General of Canada submits that Section 498A of the Criminal Code in its entirety is within the powers of the Parliament of Canada as being legislation (*a*) in relation to the Criminal Law, (*b*) in relation to the Regulation of Trade and Commerce.

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No. 4. Factum of the Attorney-General of Canada—*continued.*

PART III

ARGUMENT.

8. *Relevant provisions of the British North America Act.*—The relevant provisions of the British North America Act appear to be the following :—

" 91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

. . . . . .

2. The Regulation of Trade and Commerce.

. . . . . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

. . . . . .

" And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

" 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

. . . . . .

13. Property and Civil Rights in the Province.

. . . . . .

15. The imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province."

9. *Governing principles of interpretation.*—In the interpretation of the foregoing provisions of the British North America Act, the following propositions relative to the legislative competence of the Parliament of Canada and of the Provincial Legislatures, respectively, were laid down by the Judicial Committee of the Privy Council in *Attorney-General for Canada* v.

Attorney-General for British Columbia (1930) A.C. 111, 118, and reaffirmed in the case of In re *The Regulation and Control of Aeronautics in Canada* (1932) A.C. 54, 71, 72, as having been established by the decisions of that Board :—

" (1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92; see *Tennant* v. *Union Bank of Canada* (1894) A.C. 31.

" (2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion : see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896) A.C. 348.

" (3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91 : see *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (1894) A.C. 189, *and Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896) A.C. 348.

" (4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail; see *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada* (1907) A.C. 65."

To these propositions may be added the following recent pronouncements as to the nature and scope of the legislative powers confided to the Dominion Parliament by s. 91 of the British North America Act :

First : " While the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole " : *In re The Regulation and Control of Aeronautics in Canada* (1932) A.C. 54, 70, 71.

Second : " Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the

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British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State " : *Croft* v. *Dunphy* (1933) A.C. 156, 163.

10. *Section 498A is legislation in relation to criminal law.*—Criminal law as used in section 91, head 27 of the British North America Act, means " the criminal law in its widest sense " : *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903) A.C. 524 at p. 529. The power of the Dominion Parliament to legislate in relation to matters falling within the class of subjects, " the Criminal Law . . . including the Procedure in Criminal Matters " was discussed and defined by the Judicial Committee of the Privy Council in the case of *Proprietary Articles Trade Association et al* v. *Attorney-General for Canada, et al* (1931) A.C. 310. The enactments in question in that case were the Combines Investigation Act, R.S.C. 1927, chapter 26 and Section 498 of the Criminal Code directed against combines formed in restraint of trade. There Lord Atkin, in delivering the judgment of the Lords of the Judicial Committee, said :—

> " In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, ' The Criminal Law including the procedure in criminal matters ' (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected ' which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others ' ; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. ' Criminal law ' means ' the criminal law in its widest sense ' : *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (supra). It certainly is not confined to what was criminal by the law of England or of any province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition ; nor can it be discovered by reference to any standard but one : Is the act prohibited with penal consequences ? Morality and criminality are far from co-extensive ; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of

'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished."

11. From this judgment it is clear that the power of the Parliament of Canada to legislate in relation to the criminal law extends to commercial activities which Parliament has genuinely determined are to be suppressed in the public interest. The test is: "Is the Act prohibited with penal consequences?" There can be no doubt that here the acts defined in subsections (*a*), (*b*) and (*c*) of Section 498A are by the introductory words of that section prohibited with penal consequences. That is the whole purpose, the "pith and substance," the "true nature and character" of the section.

12. Parliament has genuinely determined that the commercial activities and practices defined in section 498A of the Criminal Code should be suppressed in the public interest. This appears from the following:—

(1) From the very nature of the enactments.

(2) The declaration in the Dominion Trade and Industry Commission Act, 1935, 25–26 George V, chapter 59, which became law at the same time, that such practices and activities are detrimental to the public interest. Section 2 (*h*) of that Act, referring to the provisions of section 498A and a number of other enactments of the Parliament of Canada, states they "prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest."

(3) The Report of the Royal Commission on Price Spreads, in which, in discussing unfair price discrimination the Commission clearly dealt with the matter from the standpoint of the public interest (Pages 8 and 270).

13. Section 498A of the Criminal Code not only satisfies the test laid down by Lord Atkin in the Proprietary Articles Trade Association case, quoted above, but it is also clearly distinguishable from the section of the Code in question in the Reciprocal Insurers case, *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924) A.C. 328. The section in that case was section 508C of the Criminal Code, which provided that, subject to wide exceptions, any person who conducted certain insurance business except as agent for a company licensed by the Minister of Finance or for certain associations should be guilty of an indictable offence. It was not seriously disputed that the purpose and effect of the section there in question was to give compulsory force to the regulative measures of the Insurance Act (p. 339). The provisions of the Insurance Act did not, in any respect then material, differ from those of the Insurance Act of 1910, which had been held *ultra vires* in *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916) 1 A.C. 588. In

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the judgment it is stated, in referring to the Insurance Act 1917 and the amendments to the Criminal Code of the same year,

> " These two statutes, which are complementary parts of a single legislative plan, are admittedly an attempt to produce by a different legislative procedure the results aimed at by the authors of the Insurance Act of 1910, which in *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916) 1 A.C. 588, was pronounced *ultra vires* of the Dominion Parliament." (p. 332).

The Board did not think it open to controversy that in purpose and effect section 508C was a measure regulating the exercise of civil rights and was an attempt, by purporting to create penal sanctions under Section 91, head 27, to appropriate to the Parliament of Canada exclusively, " a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority." (p. 342). No such attempt is made by section 498A, and indeed in the Reciprocal Insurers case it was stated at page 343 that

> " what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the sub-divisions of the jurisdiction entrusted to the Provinces."

14. *Section* 498A *is of similar character to portions of section* 508 *of the Criminal Code.*—Section 508 of the Criminal Code, enacted by 7–8 Geo. V, chapter 26, section 1, as section 508D of the Criminal Code, reads in part as follows :—

> " 508. (1) *Insurance offences.*—Any insurance company, or any officer, agent or representative thereof, who
>
> (*a*) makes or permits any distinction or discrimination in favour of individuals between the insured of the same class and equal expectation of life in the amount of premiums charged or in the dividends payable upon any policy of life insurance issued by or on behalf of the company; or
>
> (*b*) makes or assumes to make any stipulation or agreement which is intended to operate as a part of any insurance contract to which the company is or is to become a party, whether in respect of the amount, terms or conditions of the insurance, the premium to be paid or otherwise, except such as is plainly expressed in the policy issued in the case; or
>
> (*c*) pays, allows or gives, or offers to pay, allow or give, directly or indirectly, as inducement to insurer, any rebate of the premium stipulated by the policy to be payable, or any special favour or advantage in the dividends or other benefits to accrue thereon or any advantage by way of local or advisory directorship unless for actual service *bona fide* performed, or any paid employment or contract for service of any kind or any inducement whatever intended to be in the nature of a rebate of premium; or

(*d*) gives, sells or purchases as such inducement or in connection with such insurance any stock, bonds or other securities of any insurance company, or other corporation, association or partnership; and any person who knowingly receives as an inducement to insure, any rebate of premium or any such special favour, advantage or inducement as aforesaid; shall for a first offence be liable to a penalty of double the amount of the annual premium chargeable upon the application or policy in respect of which the offence is committed, such penalty not to be less than one hundred dollars and for a second or subsequent offence to a penalty of double the amount of such annual premium, the latter penalty not to be less than two hundred and fifty dollars."

In the Reciprocal Insurers case, *Attorney-General for Canada* v. *Reciprocal Insurers* (1924), A.C. 328, Question Two referred to the Court was:

"Question Two.—Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of ss. 508C and 508D of the Criminal Code as enacted by c. 26 of the Statutes of Canada 7 & 8 Geo. 5, in the absence of a licence from the Minister of Finance issued pursuant to s. 4 of the Insurance Act of Canada 7 & 8 Geo. 5, c. 29?"

Mr. Justice Duff, in delivering the judgment of the Lords of the Judicial Committee, answering the questions said, at p. 346:

"It follows from what has been said that the answer to the first question is in the affirmative, and the answer to the second, in the negative. The provisions of s. 508D have not been specifically referred to, since they do not in their terms purport to prohibit, even upon conditions, the making of the contracts described in the question, and the reference to that section, their Lordships were informed on the argument, was inserted in the question by mistake."

It is evident that at least two of the offences defined in s. 508 are of the same nature as the offences now defined in s. 498A, and the validity of s. 508, despite its inclusion in one of the questions referred in the Reciprocal Insurers case has not been questioned.

15. *Section 498A can be justified as legislation in relation to trade and commerce.*—In the construction of head 2 of sec. 91 of the British North America Act "The Regulation of Trade and Commerce," the Judicial Committee found it to be "absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures." (*Bank of Toronto* v. *Lambe* (1887) 12. A.C. 575, 586; *City of Montreal* v. *Montreal Street Railway* (1912) A.C. 333, 343, 344). Accordingly, this head of jurisdiction has been held not to justify the regulation by legislation of the contracts of a particular trade or business, such as the business of fire insurance in a single province (*Citizens Insurance Co.* v. *Parsons* (1881) 7 A.C. 96, 113) or the regulation by a licensing system of particular trades in which Canadians

would, apart from any right of interference conferred by this power, be free to engage in the provinces. *Insurance Reference* (1916) 1 A.C. 588, 596.

But quite consistently with the principle underlying the restrictions on the exercise of the power to regulate trade and commerce illustrated by these and other decisions, that power has been held to embrace exclusive authority for regulations governing external trade, that is, trade between Canada and foreign countries as well as regulation of trade in matters of interprovincial concern. In *Citizens Insurance Company* v. *Parsons* (1881) 7 A.C. 96, 113, the Judicial Committee without attempting to give an exhaustive definition of the scope of the power, said the words " regulation of trade and commerce " would include " political arrangement in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole dominion." This interpretation was formally approved by the Judicial Committee in *John Deere Plow Company* v. *Wharton* (1915) A.C. 330, 340, and has been given definite application and effect.

First, *as regards external trade*, it has been held to embrace exclusive authority to regulate external trade and commerce by means of the imposition of customs duties or otherwise (*Attorney-General for British Columbia* v. *Attorney-General for Canada* (1924) A.C. 222, 225) to prescribe the conditions upon which a foreign insurance company should be entitled to carry on its business even within the limits of a single province (*Insurance Reference* (1916) 1 A.C. 588, 597) and to authorize the investigation of the character of the facilities for, and the rates of, domestic transport : Reference *re The Combines Investigation Act* (1929) S.C.R. 409, 417, 418, per Duff, J.; affirmed on appeal (1931) A.C. 310.

Secondly, *as regards interprovincial trade*, " the regulation of trade and commerce " has been held to authorize legislation by the Dominion Parliament for the regulation of the exportation or importation of commodities from or into any province to or from another province : (*Gold Seal Limited* (1921) 62 S.C.R. 424; *Attorney-General for Ontario* v. *Attorney-General for Canada* (1896) A.C. 348, 368, 371; answers to questions 3 and 4) and to preclude the provinces from legislating in regard to trading matter of interprovincial concern. *Hudson Bay Company* v. *Hefferman* (1917) 3 W.W.R. 167 (Provincial enactment prohibiting keeping of liquor within the province for export to other provinces or foreign countries : *ultra vires*); *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931) S.C.R. 257 (Provincial enactment providing for compulsory control of the marketing outside the province of tree fruits and vegetables grown within the province : *ultra vires*); In re *The Grain Marketing Act* (1931) 2 W.W.R. 146 (Provincial enactment creating a compulsory wheat pool for the marketing of all grain grown in the province and destined to be marketed either within or without the province : *ultra vires*). These decisions fully justify the statement of Duff, J. in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931) S.C.R. 257, at p. 371,

where, in summing up an elaborate consideration of the power to regulate trade and commerce, he said :—

> " The more recent cases leave entirely untouched the view embodied in the passage quoted from *Parsons* Case (1881) 7 A.C. 96, and expressly adopted in *Wharton's* Case (1918) A.C. 330, that foreign trade and trading matters of interprovincial concern are among the matters included within the ambit of head 2, s. 91."

Thirdly, *as regards the general trade of Canada* " the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade " : *John Deere Plow Company* v. *Wharton* (1915) A.C. 330, 340.

Finally, it is to be observed that the view that the power to regulate trade and commerce can be invoked only in aid of a power Parliament possesses independently of it was definitely repudiated by the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931) A.C. 310, 326, where Lord Atkin delivering the judgment of the Board said :—

> " Their Lordships merely propose to disassociate themselves from the construction suggested in argument of a passage in the judgment in the *Board of Commerce Case* (1922) 1 A.C. 191, 198, under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject matter."

16. The prime purpose of section 498A is to define, prohibit and prescribe punishment for the offences therein set out, but the offences are commercial and trade offences and the offenders must be engaged in trade or commerce or industry. The section is designed to regulate trade and commerce generally throughout the Dominion in respect to those matters with which it deals. It affects not one trade or industry, but all. The evils it is enacted to prohibit are commercial and trade evils. Furthermore, it contemplates offences arising in more than one area in Canada, and endeavours to prohibit practices which are unfair as between different areas, and to render commercial dealings uniformly fair in all the Provinces of Canada in respect to the matters with which it deals.

It is therefore submitted that the section is validly enacted by the Parliament of the Dominion of Canada in relation to the regulation of trade and commerce.

No. 4. Factum of the Attorney-General of Canada—*continued.*

17. It will, therefore, be submitted on behalf of the Attorney-General for Canada that the answer to the question referred to the Court is that section 498A of the Criminal Code is not, nor is any part thereof, *ultra vires* of the Parliament of Canada.

N. W. ROWELL.
L. S. ST. LAURENT.
C. P. PLAXTON.

No. 5. Factum of the Attorney-General of Ontario.

No. 5.

Factum of the Attorney-General of the Province of Ontario.

The question referred is :

" Is said Section 498A of the Criminal Code, or any or what part or parts of the said Section, ultra vires of the Parliament of Canada."

The Parliament of Canada by head 27 of Section 91 of the British North America Act is given exclusive power to enact legislation dealing with:

" 91. (27).—The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

The Provincial Legislatures are given exclusive power to make laws dealing with " Property and Civil Rights in the Province." [Section 92 (13)].—" The imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in Section 92." [92 (15).]

Provincial enactments falling within head 15 of Section 92, belong to that branch of the law which is criminal.

What the Provinces may do under the authority of 92 (15) is to impose punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to a matter coming within any of the Provincial enumerations, and is, therefore, confined to matters described generally as of a merely local or private nature in the Province.

This does not necessarily diminish or affect the amplitude of the Dominion power under Section 91, head 27, because Criminal Law in its widest sense is reserved for the Parliament of Canada.

In *Attorney-General for Ontario* v. *Hamilton Street Railway Company*, (1903) A.C. 524, it is stated that it is the Criminal Law in its widest sense that is reserved to the Dominion.

In *Attorney-General of Canada* v. *Attorney-General of Alberta*, (1916) A.C. 588, it appears that to fall within " Criminal Law," Section 91 (27), it must be legislation that genuinely creates a new offence and not merely an exercise of an ancillary power to create an offence under the guise of Criminal Law in connection with a subject matter that lies exclusively within Provincial jurisdiction.

In *Re Board of Commerce,* (1922) 1 A.C. 191, it is stated that it must be legislation, the subject matter of which, by its very nature, belongs to the domain of Dominion jurisprudence.

The following appears in the judgment of Viscount Haldane at p. 199 :

" It is one thing to construe the words ' the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters,' as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence.

A general law, to take an example, making incest a crime, belongs to this class.

It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application."

Mr. Justice Newcombe in the *Combines Investigation Act Reference and Section* 498 *of the Criminal Code,* (1929) S.C.R., says at the bottom of page 422 :

" It is not necessarily inconsistent, and I do not think it was meant to be incompatible with the notion, that one must have regard to the subject matter, the aspect, the purpose and intention, instead of the form of the legislation, in ascertaining whether, in procuring the enactment, Parliament was engaged in the exercise of its exclusive and comprehensive powers with respect to the criminal law,—or was attempting in excess of its authority, under colour of the criminal law, to trench upon property and civil rights, or private and local matters in the Province—

And when, in the case of the Combines and Fair Prices Act, 1919, as in the case of the Insurance Act, 1910, their Lordships found that Parliament was really occupied in a project of regulating property and civil rights, and outside of its constitutional sphere, there was no footing upon which the exercise of Dominion power, with relation to the criminal law, could effectively be introduced."

In the *Reciprocal Insurers Case* (1924) A.C. 328, much the same decision is given where a Section of the Criminal Code was held invalid, since, in substance, though not in form, it was in regulation of contracts of insurance, subjects not within the legislative competence of the Dominion.

This is what Mr. Justice Duff said in that case at p. 342 :

" In accordance with the principle inherent in these decisions, their Lordships think it is no longer open to dispute that the Parliament of Canada cannot by purporting to create penal sanctions under Section 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert

In the Supreme Court of Canada.

No. 5. Factum of the Attorney-General of Ontario—*continued.*

no legal authority and that if when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid."

In *Toronto Electric Commissioners* vs. *Snyder*, (1925) A.C. 396, Lord Haldane, who pronounced the judgment, referred to the judgment in the *Reciprocal Insurers Case*, (1924) A.C. 328, as summing up the effect of the series of previous decisions relating to the point, and he reiterated the passage quoted in the Reference to this case.

Having in view the above decisions relative to the respective powers of the Dominion Parliament and the Provinces, it is necessary to examine the " pith and substance " and the object of Section 498A of the Criminal Code—

First : Dealing with clause (a).

1. It does not prohibit any contracts between the seller and the purchaser for the sale of goods.

2. It attaches penal consequences to the seller granting more favourable discounts, rebates and allowances to competitors of the purchaser.

3. The object of the subsection appears to be to compel traders to sell to all competitors on uniform discounts, etc., having regard to quantity and quality.

4. It seeks to regulate dealings by a trader with those who are as amongst themselves competitors, and will apply to transactions within and without a Province.

5. There is no compulsion to sell to all such competitors who desire to make purchases, but if sales are made, and the contracts are not on the prescribed footing, the seller, according to the subsection, commits a crime.

6. No purchaser is obliged to pay what his competitors pay and may secure more favourable discounts, etc., by purchasing from a seller who has no transactions with his competitors.

7. The sole test of criminality is, has a trader in competition with other traders given more favourable discounts, etc., to a purchaser than he has accorded to competitors of the purchaser?

8. A seller may commit a crime if he meets the discounts, etc., offered by one of his competitors, without making the concession available to parties previously sold.

9. The whole transaction involved is contract. The subsection has all the earmarks of an attempt to interfere with Provincial jurisdiction over contract and civil rights.

10. It is not a subject matter which by its very nature belongs to the domain of criminal jurisprudence.

11. The Dominion is really occupied in a project of regulating property and civil rights—something entirely outside the constitutional jurisdiction of the Dominion Parliament.

12. It purports in form to create penal sanctions and by so doing the Dominion Parliament appropriates to itself exclusively a field of jurisdiction in which apart from the formal procedure, it would exercise no legislative authority.

13. There is nothing in the nature of the transactions themselves, or in the language of the subsection to indicate that the public interest is being protected or that a wrong against a community is being prevented.

It is different from the subject matter dealt with in Section 498 of the Code, and which was under consideration in "*Proprietary Articles Trade Association and others and Attorney-General for Canada,*" [1931] A.C. 310.

In that case it was stated that the Section under consideration dealt with combines which have operated, or are likely to operate, to the detriment or against the interest of the public, or their consumers, producers or others.

In that case Parliament genuinely determined that commercial activities so described should be suppressed in the public interest and in commenting on this their Lordships saw no reason why Parliament should not make them crimes.

Further, Section 498 makes "conspiracy" to limit transportation facilities, restrain commerce, lessen manufacturing, and lessen competition, a crime.

At common law, conspiracies were criminal.

Subsection (a) of Section 498A does not purport to deal with conspiracies. It simply makes it a crime for a seller to grant more favourable discounts, rebates or allowances to competitors of the purchaser. And its object and scope falls within the observations heretofore set out in this Factum.

14. There is nothing in this subsection (a) to show that the Dominion has genuinely determined that commercial activities such as are contemplated in the subsection, should be suppressed in the public interest, nor is the element of conspiracy present.

15. It is an interference with the contractual liberty of particular traders, and the Parliament of Canada cannot genuinely determine that such an interference with contractual rights or liberties is in the public interest.

The Attorney-General of Ontario submits for these reasons, and those that will be advanced at the argument of the Reference, that the answer to the question referred should be.

(1) That subsection (a) of Section 498A is ultra vires of the Dominion Parliament.

(2) That subsections (b) and (c) might be considered intra vires of the Parliament of Canada.

I. A. HUMPHRIES.

Toronto.

January, 1936.

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec.

No. 6.

Factum of the Attorney-General of the Province of Quebec.

The question referred as to this Act is as follows:

"Is said section 498A of the Criminal Code, or any or what part or parts of the said section, *ultra vires* of the Parliament of Canada?"

The section referred to in this question reads as follows:

"498A. 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 or 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."

To summarize, this section declares guilty of an indictable offence and liable to the penalty therein stated any person engaged in trade or commerce or industry who,—

(*a*) discriminates against competitors with regard to any discount, rebate or allowance in respect of a sale of goods of like quality and quantity;

(*b*) sells goods in any area of Canada at prices lower than those exacted by the same seller elsewhere in Canada for the purpose of destroying competition or eliminating a competitor;

(*c*) sells goods at unreasonably low prices for the same purpose.

The material provisions of the British North America Act, 1867, are in this case as follows:

" VI.—DISTRIBUTION OF LEGISLATIVE POWERS

" POWERS OF THE PARLIAMENT

" 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

.....

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

.....

And any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

" EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

" 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

.....

" 13. Property and Civil Rights in the Province.

.....

" 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

" 16. Generally all Matters of a merely local or private Nature in the Province."

The contention of the Dominion is in substance that the provisions of section 498A of the Criminal Code fall within the terms of No. 27 " The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters," and also that it is within the purview of the residuary clause at the beginning of section 91.

The contention of the Attorney-General of the Province of Quebec is that the subject matter of section 498A is one coming within Nos. 13, 15 and 16 of section 92.

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

In brief the solution depends principally upon the true construction of section 498A; whether it enacts provisions coming within the purview of the criminal law or if it constitutes an invasion of exclusive provincial powers respecting civil law, the imposition of punishment for violation of a provincial statute, and matters of a merely local or private nature in the Province.

It is now well established that the jurisdiction of Parliament in respect to criminal law comprehends the power to create new statutory offences and is not restricted to the criminal law as it existed either by statute or by the common law in 1867.

The terms " Criminal Law " as used in section 91 are to be considered in the very broadest manner, in the same way in fact as the words " Civil Rights " in No. 13 of section 92.

In *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (1903) A.C. 524, the Lord Chancellor (then Lord Halsbury), in pronouncing the judgment, expressed himself as follows: (1929, S.C.R. at pp. 420, 421).

> " The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition, that the language itself affords. Sect. 91, subs. 27, of the *British North America Act*, 1867, reserves for the exclusive legislative authority of the Parliament of Canada ' the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction '. It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, ' the Constitution of Courts of Criminal Jurisdiction ', renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament."

In re The Dominion Insurance Act, 1910, which was considered in *Attorney-General of Canada* v. *Attorney-General of Alberta* (1916) 1 A.C. 588, sect. 70 imposed penalties for contravention of the Act, and it followed the fate of the principal part of the Act which was held to be one regulating the business or trade of insurance; so that the question did not fairly come up.

The point at issue here was raised *In re The Board of Commerce Act*, 1919, and *The Combines and Fair Prices Act*, 1919 (1922) 1 A.C. 191, wherein the Parliament of Canada had purported to prohibit the formation and operation of trade combinations and distribution of commodities in the provinces as the Board of Commerce might consider to be detrimental to the public

interest. In these Acts it was, moreover, provided that the Board might restrict the accumulation of certain commodities in the case of a private person, for his household, and, in the case of a trader, for his business; and that the Board could attach criminal consequences for breaches of the Act.

In the judgment rendered in that case no doubt was shown as to the wide extent of the terms " Criminal Law ", but it was added: (1929 S.C.R. at p. 422):

> " For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words ' the Criminal Law, except the Constitution of courts of Criminal Jurisdiction, but including the procedure in Criminal Matters', as enabling the Dominion Parliament to exercise legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application."

Mr. Justice Newcombe commenting on this paragraph in the case of the *Reference re Validity of the Combines Investigation Act and of Section 498 of the Criminal Code*, (1929) S.C.R., 409, states as follows at pp. 422, 423:—

> " One must of course endeavour to extract the meaning of this paragraph, and perhaps some confusion is apt to be caused by the antithesis, and the illustration chosen for the explanation of the first limb, but I am persuaded that there can be no intention here to restrict the legislative power of Parliament in the creation of offences under s. 91 (27) so as to exclude an act or omission which is not *malum in se*. The occasion did not call for that, and the passage should be read *secundum subjectam materiam*. It is not necessarily inconsistent, and I do not think it was meant to be incompatible, with the notion, that one must have regard to the subject-matter, the aspect, the purpose and intention, instead of the form of the legislation, in ascertaining whether, in producing the enactment, Parliament was engaged in the exercise of its exclusive and comprehensive powers with respect to the criminal law, or was attempting, in excess of its authority, under colour of the criminal law, to entrench upon property and civil rights, or private and local matters, in the provinces; and when, in the case of the *Combines and Fair Prices Act*, 1919, as in the case of the *Insurance Act*, 1910, their Lordships found that Parliament was really occupied in a project of regulating property and civil rights, and outside of its constitutional sphere there was no footing upon which the exercise of Dominion powers, with relation to criminal law, could effectively be introduced—no valid enactment to which criminal sanction could be applied."

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

It is now equally well established that under the pretence of legislating as to criminal matters Parliament may not invade the domain of civil law.

Mr. Justice Newcombe, *idem*, at pp. 423, 424, expresses himself as follows :—

> " Then came the *Reciprocal Insurers*' case ((1924) A.C. 328), which contributes a very instructive addition to the interpretation of the British North America Acts. This case suggests no limitation of the legislative authority of the Dominion with regard to the criminal law, although it recognizes that a Dominion enactment, which, in language and form, and *a sociis*, is criminal, may, having regard to its history, real subject matter, true aspect and purpose, by which it must also be judged, be found, in reality, intended to regulate property and civil rights in a province, or matters of a merely local or private nature, such as have been committed to the exclusive authority of the provinces, and so not to fall within the Dominion enumeration; and it is especially made clear that the quality of such an enactment is not concluded by its introduction into the *Criminal Code*."

Sir Lyman P. Duff, rendering judgment for the Judicial Committee in the case of the *Reciprocal Insurers* (1924) A.C., stated at page 337, as follows :—

> " It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the ' true nature and character ' of the enactment : *Citizens' Insurance Co.* v. *Parsons* ((1881) 7 App. Cas. 96); its ' pith and substance ' : *Union Colliery Co.* v. *Bryden* ((1899) A.C. 580); and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinized in its entirety' : *Great West Saddlery Co.* v. *The King* ((1921) 2 A.C. 91, at p. 117). Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing."

And further, at page 342 :

> " In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no

legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid."

His Lordship thought it proper to add, however, that what had been said :

> " does not involve any denial of authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces."

Viscount Haldane, rendering judgment for the Judicial Committee in the case of *Toronto Electric Commissioners* v. *Snider* (1925) A.C. p. 396, quotes, with approval, at p. 407, the above remarks of Sir Lyman P. Duff.

The latest case with regard to these two points is that of the *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, (1931) A.C. p. 310. At pages 324, 325, it was again affirmed that Parliament was endowed with the capacity to make new crimes because, as Lord Atkin stated (p. 324), " Criminal law connotes only the quality " of such acts or omissions as are prohibited under appropriate penal " provisions by authority of the State. The criminal quality of an act " cannot be discerned by intuition; nor can it be discovered by reference " to any standard but one : Is the Act prohibited with penal " consequences ? "

At the same time Lord Atkin stated that this wide power did not go as far as to authorize the Dominion to interfere with provincial rights.

It is equally beyond dispute that with regard to matters coming within the jurisdiction of the provinces they may, under section 92 (No. 15) impose penalties for violations of any statute which it is within their competence to pass.

The question at issue is therefore dependent upon the point as to whether the section of the Criminal Code under examination is one which deals with what is truly criminal law, or whether, under pretence of so doing, it encroaches upon the exclusive power of the provinces to legislate with regard to civil rights or local and private matters in the province.

It is well to state at once that section 498A of the Criminal Code goes further in the way of creating criminality than did section 498 of the same Code which, in the case of the *Proprietary Articles Trade Association* mentioned above was held to be *intra vires.*

But above all it is necessary to ascertain whether section 498A is really criminal law or if its ultimate object, its " pith and substance," is not designed, under the guise of criminal law, to affect the contractual rights of parties entitled under the laws of their province to enter into contracts.

All three paragraphs of the section are concerned in one way or another with " price fixing." Now the determination of the price of a commodity is obviously a matter of civil law.

In the Supreme Court of Canada.

No. 6. Factum of the Attorney-General of Quebec—*continued.*

It restricts the liberty that the vendor has under civil law to grant more favourable terms to competitors of the purchaser; it also restricts the faculty that the vendor possesses to sell at different prices in different areas of Canada, and deprives him of his right of selling goods at as low a price as he believes judicious.

All of these rights and faculties are under the control of the Legislature of each province. To take them away by an enactment of the criminal law is the equivalent of enacting directly that they shall cease to exist.

There is nothing in the text of the section itself nor in the nature of the transactions to which penalties are attached to show that this provision is due to an endeavour to protect the public or to prevent a wrong against the community. It is a contractual matter purely and simply and as such is beyond the legislative competence of Parliament.

It can hardly be contended that the Dominion has jurisdiction, under the *residuary clause of section* 91, to enact this legislation, for the subject-matter of section 498A is not outside those mentioned in section 92 of the British North America Act, nor does it refer to circumstances that imperil the national life.

The absolutely civil character of the legislation is emphasized by the fact that selling at unreasonably low prices or at lower prices in one place than in another for the mere purpose of eliminating one competitor is made a crime, and so is discriminating between competitors no matter how insignificant the effect may be on competition.

The legislation approved of in the *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931) A.C., 310, forbade interfering with competition to the prejudice of the public or unduly, which was held to mean the same thing.

Stinson-Reed Builders Supply Co. and Others v. *The King* (1929) S.C.R., p. 276.

Weidman v. *Shragge* (1912) 46 Can. S.C.R., 1.

FOR THE ABOVE REASONS and the arguments which may be advanced at the hearing of the Reference, the Attorney-General of Quebec submits that the Act in question must be declared *ultra vires* of the Parliament of Canada.

CHARLES LANCTOT,
AIMÉ GEOFFRION.

In the Supreme Court of Canada.

No. 7. Factum of the Attorney-General of New Brunswick.

No. 7.

Factum of the Attorney-General of New Brunswick.

PART ONE.

STATEMENT OF FACTS.

This matter comes before the Supreme Court of Canada as a result of a reference made by the Committee of the Privy Council on the recommendation of the Minister of Justice as set out in the Record herein on Pages Three and Four, inscribed for hearing before the said Court on the Fifteenth day of January, A.D. 1936, by order of the Rt. Hon. The Chief Justice of Canada, bearing date the Fourteenth day of November, A.D. 1935, as appears in the Record Page Five, pursuant to Section 55 of the Supreme Court Act, R.S.C. 1927, Chapter 35.

PART TWO.

GROUNDS OF OBJECTION.

The Province of New Brunswick associates itself with the grounds of objection set out in the Factum of the Province of Quebec and endorses and adopts the stand taken by that Province in opposing the validity of the said referred legislation.

PART THREE.

ARGUMENT.

The Province of New Brunswick associates itself with the argument contained in the Factum of the Province of Quebec and endorses, adopts and relies upon such argument and authorities as are contained in said Factum, with respect to the legislation involved in this reference.

DONALD V. WHITE,
Counsel for the Attorney-General of New Brunswick.

No. 8. Factum of the Attorney-General of Manitoba.

No. 8.

Factum of the Attorney-General of Manitoba.

The Attorney-General of Manitoba at present expresses no opinion on this question referred to the Supreme Court of Canada as follows:

> Is section 498A of the Criminal Code, or any or what part or parts of the said section, *ultra vires* of the Parliament of Canada?

but reserves the right to appeal from any judgment which is rendered.

W. J. MAJOR,
Attorney-General of Manitoba.

Winnipeg, January 6th, 1936.

In the Supreme Court of Canada.

No. 9. Factum of the Attorney-General of British Columbia.

No. 9.

Factum of the Attorney-General of British Columbia.

PART I.—OUTLINE OF CASE.

On behalf of the Attorney-General of British Columbia it is submitted that the foregoing section of the Criminal Code is not within the competence of the Parliament of Canada:

BECAUSE:—

One: It deals with the subject matter of "property and civil rights" and of "matters of a purely local or private nature in the province" within the enumerated headings (13) and (16) of section 92 of the British North America Act.

Two: It is an attempt to deal with matters coming within these enumerated headings of section 92 under the guise of criminal law and as such is colourable legislation.

Three: It is outside the field of criminal law as understood in section 91 (27) of the Canadian Constitution and cannot be brought within that field by calling it a criminal offence.

Four: Federal legislation prohibiting an act in relation to a subject matter properly coming within the field of property and civil rights which act is not within the field of existing criminal jurisprudence, or of any other of the enumerated heads of section 91, which is not malum per se, and which is not limited in its prohibitions to acts or conduct immoral in character or detrimental to the public welfare, cannot be upheld as coming within section 91 (27) merely by attaching penal consequences and making it an indictable offence.

Five: Legislation which obviously is intended to regulate trade and commerce in its local aspects cannot be supported as criminal law merely by an attempt to merge the legislative encroachment into the prohibition.

Six: Notwithstanding the dictum of Lord Watson in *Attorney-General Ontario* v. *Hamilton Street Railway* that "Criminal law means the criminal law in its widest sense" there are parts of the criminal law which do not come within the meaning of the term as used in section 91 (27). For instance the prohibitions and penalties imposed by the provinces under section 92 (16) are within the term criminal law: see *Nat Bells* Case. The prohibitions considered in the *Reciprocal Insurers* Case and in the *Board of Commerce* Case are both such as to come within Lord Atkin's definition of criminal law in the *Trades Combines* Case and yet both were excluded from the scope of section 91 (27) because in substance they were colourable in purpose and in fact encroachments on the provincial field. All these prohibitions might properly be classed as criminal law in Great Britain where Parliament has no constitutional limitations.

Seven: If the Parliament of Canada can assume exclusive control over trade and commerce in their purely local aspects as property and civil

rights in the province by the device of prohibitions declaring certain acts to be indictable offences "it would be difficult to assign limits to the measure in which by a procedure strictly analogous to that followed in this instance the Dominion might dictate the working of provincial institutions and circumscribe or supersede the legislative and administrative authority of the Provinces."

* * * * *

PART II.—ARGUMENT.

1. Three cases are cited as governing:—

The Board of Commerce Case: A Judgment of Lord Haldane in 1919. "Reported Camerons Cases," Vol. 2, p. 253.

The Reciprocal Insurers Case decided by Mr. Justice Duff (now Chief Justice of Canada) in 1924. Reported Second Volume "Cameron," p. 336.

and

The Trades Combines Case decided by Lord Atkin in 1931. Reported under the name *Proprietary Articles Trade Association* v. *Attorney-General of Canada,* 100 L.J. P.C. 84.

2. In each of these cases the Parliament of Canada declared the doing of certain prohibited acts to be criminal offences to be punished on conviction according to the provisions thereof.

3. In the first two cases the legislation was held by the Privy Council to be *ultra vires.* In the last case the legislation was upheld by that tribunal.

4. The distinction between the two groups is obvious: In the first instances the enactments attempted to regulate and control—in one case the formation of trade combinations—in the other by the licensing of Insurance Companies. The prohibitions as criminal offences in each case were admittedly intended to make effective the controlling and regulating provisions of the enactments.

In the first case Lord Haldane held: Parliament cannot "first attempt to interfere with a class of subject committed exclusively to the Provincial Legislature and then justify this by enacting ancillary provisions, designated as new phases of Dominion Criminal Law, which require a title to so interfere as basis of their application."

In the second case Mr. Justice Duff held: "The Parliament of Canada cannot by purporting to create penal sanctions under section 91 head 27 appropriate to itself exclusively a field of jurisdiction in which apart from such a procedure it could exert no legal authority, and if when examined as a whole legislation in form criminal is found in aspects and for purposes exclusively within the provincial sphere to deal with matters committed to the Provinces it cannot be upheld as valid."

In the third case Lord Atkin held that the new Statute differed in essentials from the Board of Commerce Act. The first Act contained five different provisions which empowered it to assume control or deal with

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matters in the sphere of property and civil rights. His Lordship pointed out that: "None of these powers exist in the provisions now under discussion. There is a general definition and a general condemnation; and if penal consequences follow they can only follow from the determination by existing Courts of an issue of fact defined in express words by the Statute."

His Lordship considered the argument and pronouncements in previous cases suggesting that the field of criminal jurisprudence was limited to subject matters *malum per se* or having a moral taint or as to which criminal jurisdiction had heretofore existed. He stated: "The power must extend to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by the authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the Act prohibited with penal consequences?"

5. On its face as above quoted Lord Atkin's judgment would seem to dispose of the matter adversely to the present submission. The judgment however requires and will bear further analysis.

6. The definition of criminal law set out by Lord Atkin was not intended to be a definition within section 91 (27). It is stipulated by him earlier in the judgment quoting from *Parsons* Case "It is unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions." The definition propounded in the very wide terms was only intended to be an answer to the argument which had urged a more restricted definition as limiting the field of criminal jurisprudence. It was never intended that everything which might be termed criminal law as applicable to the Imperial Parliament equally applied to the jurisdiction of the Parliament of Canada.

Two illustrations have already been given in Part One, paragraph six to the contrary.

In jurisdictions where form may be the determining factor undoubtedly the legislation now under consideration meets the test of Lord Atkin's definition.

But as Mr. Justice Duff points out in the *Reciprocal Insurers* Case, at p. 341, "of course where there is an absolute jurisdiction vested in a legislature the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation to determine what the Legislature is really doing." It is not therefore the "frame" of the legislation but the true "nature and character" which must determine its quality.

7. So here the question is: In substance is Parliament really making a new crime or under the guise of criminal law is it really invading the provincial sphere?

8. Again considering the *Combines Investigation Act* Case, this time from the standpoint of the form of the legislation as compared with the present Statute once again the decision is apparently adverse.

But again the subject invites further consideration. There as here the prohibition differed from that in the *Reciprocal Insurers* Case and that of the *Board of Commerce*. In the present Act as in the *Trades Combines* Case there is an unqualified prohibition and in neither case does the prohibition depend on antecedent provisions which interfere in provincial matters without title so to do.

9. It is submitted however that this is a distinction not necessarily with a difference. In both previous cases held to be invalid legislation the frame itself made it obvious that there was encroachment. Where the alleged encroachment is confined to the prohibition itself it is not so obvious and consequently more difficult to establish. The task however is not insurmountable.

In the *Combines Investigation* Case the Statute not only differed in substance from the Board of Commerce Act but it also differs in substance from section 498A now under consideration.

10. The difference from the present Statute is that in the Combines Investigation Act the subject matter was criminal in its character within a much narrower definition than the very general one already outlined as pronounced by Lord Atkin. This fact was also emphasised in his judgment. Lord Atkin says at p. 90: " But only those Combines are affected which have operated or are likely to operate to the detriment or against the interest of the public; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest their Lordships see no reason why Parliament should not make them crimes."

A reference to the other Statute there under consideration viz., Code Section 498, shows that it dealt with conspiracies or combines which unduly limit etc. (The word " unduly " limiting the act to cases against public welfare.)

11. In contrast the present Act prohibits the acts without limitation because of their detriment to the public interest.

12. It may well be and as Lord Atkin says that the criminal quality of an act cannot necessarily be discerned by intuition or discovered by any standard of morality but it is also true that acts which do offend our moral standard or are *malum per se* or are detrimental to the public welfare are at once recognized as within the field of criminal law. This clearly was had in mind by Lord Haldane in the *Board of Commerce* Case referring to that category of acts which by their very nature belong to the domain of criminal jurisprudence.

So also Mr. Justice Duff in the *Reciprocal Insurers* Case at p. 345, where he gives as illustrations of federal jurisprudence " corruption in municipal elections " and " negligence of a given order in the management of a railway train," which of course might result in death. Supposing

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No. 9. Factum of the Attorney-General of British Columbia—*continued.*

in contrast and within Lord Atkin's definition a federal Act should declare it to be a crime to vote at a municipal election, or for any servant to be negligent in the performance of his master's orders, could such enactments be upheld merely because there was a general prohibition and a penalty?

13. The combined effect of the *Board of Commerce* Case and the *Combines Investigation Act* Case is:—

First: If the federal Act in substance as indicated by its provisions is an undertaking to regulate matters clearly within provincial sphere it is *ultra vires* even though there is:

(A) a general provision for a prohibition wide enough to come within an abstract definite of criminal law, and

(B) there are provisions limiting the scope of the Act to matters detrimental to the public welfare.

Second: (A) If there are no provisions indicating as in first an attempt to regulate matters within the provincial sphere, and

(B) The matters prohibited are confined to conspiracies or such or to acts detrimental to the public welfare then it will be upheld as criminal law.

14. There is now a third situation: where as in the second above there is (A) no provision indicating an attempt to regulate matters within the provincial sphere. But (B) unlike the second above the matters prohibited are not confined to conspiracies or to acts detrimental to the public welfare.

15. It is submitted that there has been no authoritative decision upholding as valid federal legislation in virtue of section 91 (27) any enactment forbidding with penal sanctions actions within the sphere of property and civil rights, which actions are not within the field of existing criminal law, or any of the other enumerated heads of section 91, which are not *malum per se* and which are not limited to conduct detrimental to the public welfare.

16. Examination of section 498A.

It is submitted that an examination of this section establishes:—

First: The prohibited actions are clearly within section 92 (13) and these prohibitions could have been passed by a provincial Parliament.

Second: The actions prohibited are not *malum per se* or are they acts which are limited either by the language or by the character of the actions forbidden to cases where they "have operated or are likely to operate to the detriment or against the interest of the public."

Third: Reference is made in the "Reference" to this Honourable Court to the recommendations in the report of the Royal Commission on Price Spreads. This report requires the suppression of an evil which can be done effectively by restricting the conduct coming within the scope of the evil.

Parliament has not so confined its enactment, but has stopped all rebates or price cutting done to destroy competition or to eliminate a competitor. As Lord Haldane pointed out in the "*Salt*" Case in considering these enactments undue competition may be more of a public evil than combinations in restraint of trade.

17. It is submitted that when the federal Statute prohibits an act which is within 92 (13) and does so in regard to something not normally within the field of criminal jurisprudence or detrimental to the public interest the legislation is *prima facie* an attempt to interfere with provincial rights.

It is submitted to hold otherwise will be to open a door not afterwards to be closed which will permit serious inroads on provincial powers and impair the scheme of the Constitution.

Respectfully submitted.

J. W. DE B. FARRIS,

Of Counsel for the Attorney-General of British Columbia.

London.

15th December, 1935.

No. 10.

Factum of the Attorney-General of Saskatchewan.

The Attorney-General of Saskatchewan at present expresses no opinion on this question referred to the Supreme Court of Canada as follows :—

Is section 498A of the Criminal Code, or any or what part or parts of the said section, *ultra vires* of the Parliament of Canada?

but reserves the right to appeal from any judgment which is rendered.

SAMUEL QUIGG,

of Counsel for the Attorney-General of the Province of Saskatchewan.

Regina, January 6th, 1936.

In the Supreme Court of Canada.

No. 11.
Formal Judgment, 17th June 1936.

No. 11.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

Wednesday, the seventeenth day of June, A.D. 1936.

PRESENT.

THE RIGHT HONOURABLE SIR LYMAN P. DUFF, P.C., G.C.M.G., C.J.C.
THE HONOURABLE MR. JUSTICE RINFRET.
THE HONOURABLE MR. JUSTICE CANNON.
THE HONOURABLE MR. JUSTICE CROCKET.
THE HONOURABLE MR. JUSTICE DAVIS.
THE HONOURABLE MR. JUSTICE KERWIN.

IN THE MATTER of a Reference as to whether Section 498A of the Criminal Code, being Chapter 56 of the Statutes of Canada, 1935, or any or what part or parts of the said Section, is *ultra vires* of the Parliament of Canada.

WHEREAS by Order in Council of His Majesty's Privy Council for Canada, bearing date the fifth day of November, in the year of our Lord, one thousand nine hundred and thirty five (P.C. 3451), the important question of law hereinafter set out was referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the Supreme Court Act, Revised Statutes of Canada, 1927, chapter 35 :—

> " Is said Section 498A of the Criminal Code, or any or what part or parts of the said section, *ultra vires* of the Parliament of Canada ? "

AND WHEREAS the said question came before this Court for hearing and consideration on the fifteenth, sixteenth and seventeenth days of January, in the year of our Lord, one thousand nine hundred and thirty six, in the presence of Hon. N. W. Rowell, K.C., Mr. Louis St-Laurent, K.C., Mr. C. P. Plaxton, K.C., and Mr. R. St-Laurent of counsel for the Attorney-General of Canada; Hon. A. W. Roebuck, K.C., and Mr. I. A. Humphries, K.C., of counsel for the Attorney-General for the Province of Ontario; Mr. Charles Lanctot, K.C. and Mr. Aimé Geoffrion, K.C., of counsel for the Attorney-General of the Province of Quebec; Mr. D. V. White, of counsel for the Attorney-General for the Province of New Brunswick; Hon. G. McG. Sloane, K.C. and Mr. J. W. de B. Farris, K.C. of counsel for the Attorney-General of the Province of British Columbia; Mr. J. Allen, K C., of counsel for the Attorney-General for the Province of Manitoba; and Mr. S. Quigg of counsel for the Attorney-General for the Province of Saskatchewan; and after due notice to the Attorneys-General for the Provinces of Alberta, Nova Scotia and Prince Edward Island;

In the Supreme Court of Canada.

No. 11. Formal Judgment, 17th June 1936—*continued.*

WHEREUPON and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said Reference should stand over for consideration, and the same having come on this day for determination; the Court hereby certifies to His Excellency the Governor-General in Council, for his information, pursuant to subsection 2 of section 55 of the Supreme Court Act, that the opinion of the Court is as follows :—

" 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*."

and that the reasons for such answers are to be found in the reasons for the answers written by the Chief Justice and concurred in by Mr. Justice Rinfret, Mr. Justice Davis and Mr. Justice Kerwin and in the reasons for the answers written by Mr. Justice Cannon and concurred in by Mr. Justice Crocket, copies of which reasons are hereunto annexed.

(Signed) J. F. SMELLIE,
Registrar.

No. 12.

No. 12. Reasons for Judgment. (*a*) Duff C.J. (concurred in by Rinfret, Davis, and Kerwin JJ.).

Reasons for Judgment of Duff C.J.

(*a*) THE CHIEF JUSTICE (concurred in by Rinfret, Davis, and Kerwin JJ.)—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

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No. 12. Reasons for Judgment. (a) Duff C.J. (concurred in by Rinfret, Davis, and Kerwin JJ.)— *continued.*

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 *Proprietary Articles Trade Association* v. *A.G. for Canada* (1), 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 bylaws 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* (2); and the conditional and qualified prohibitions enforceable in the same way which were upheld in *Hodge* v. *The Queen* (3). 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.

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(1) (1931) A.C. 310.

(2) (1896) A.C. 348.

(3) (1883) 9 A.C. 117.

No. 12.
Reasons for Judgment.
(*a*) Duff C.J. (concurred in by Rinfret Davis, and Kerwin JJ.)—*continued.*

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*) (1).

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

(*b*) Cannon J.

(*b*) CANNON J.—Paragraph (*a*) of 498A injects into every contract of sale by a person engaged in trade, commerce or industry a stipulation, obligatory under pain of a fine or imprisonment, in favour of the competitors of the purchaser, that any discount, rebate or allowance granted to the purchaser would be available at the time of the transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity.

This would, in every such case, be an application, by force of law, to every competitor of the purchaser as against the vendor of the " stipulation pour autrui " provided for by article 1029 of the Civil Code of the Province of Quebec, which says:

" A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes for another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it."

Prima facie, therefore, Parliament has legislated directly in a matter of civil rights and has simply annexed to it a sanction, which would, by

(1) (1932) A.C. 41, at p. 53.

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force of 91 (27) transfer the subject-matter from the provincial to the federal realm.

Blackstone, in his Commentaries, divides the wrongs known to the law into two species, Private and Public Wrongs, considering torts under the former and crimes under the latter denomination. He says:

"The distinction seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs or crimes are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder and robbery are properly ranked among crimes; since, beyond the injury done to individuals, they strike at the very being of the society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity."

The first characteristic of a crime, therefore, is the danger to the community as a whole which the conduct of the offender is felt to involve. It may, from this point of view, be said to be the breach of a general obligation imposed by the law for the benefit of the State; whereas a tort is the breach of a particular obligation imposed by the law for the benefit of the individual.

The second characteristic by which a crime may be recognized is to be found, not in the nature of the conduct itself, but in the consequences to which that conduct gives rise. Whereas the object of the law in the case of a tort is primarily the *compensation* of the party injured, its object in the case of crime is primarily the *punishment* of the offender. The civil law looks rather to the plaintiff, the criminal law to the defendant. If, then, the result of the proceedings is the satisfaction of the plaintiff, we may expect to find that the conduct in question amounts to a tort; if it is the punishment of the defendant, then it will be a crime. The result of this difference in attitude is reflected in the royal power of *Pardon*. The King may pardon a criminal, but not a civil offence. It is reasonable that he should have the power to waive an injury to the State of which he is the representative, and to put an end to proceedings which are carried on in his name; but he cannot absolve a defendant in a civil action from the duty of making compensation to the individual whom he has injured.

The above is taken from Stephen's Commentaries of the Laws of England, 19th ed., vol. IV, pp. 3, 4 and 5, where he gives as an approximate definition of crime that it is the breach of an obligation imposed by law for the benefit of the community and which results in the punishment of the offender.

Every command involves a sanction; and thus every law forbids every act which it forbids at all under pain of punishment. This makes it necessary to give a definition of punishment as distinguished from sanction.

The sanctions of all laws of every kind will be found to fall under two great heads; those who disobey them may be forced to indemnify another person either by damages or by specific performance, or they may themselves be subjected to some sufferings. In each case the legislator enforces

his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying it. It must be imposed for public purposes, and have no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public. The result of the cases appears to be that the infliction of punishment in the interest of the public is the true test by which criminal are distinguished from civil proceedings, and that the moral nature of the act has nothing to do with the question. It is sufficient in this place to observe that they illustrate the general proposition that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment in the interest of the public.

I conclude that the first paragraph (*a*) does not fill the foregoing requirements, inasmuch as it has in view only the protection of the individual competitors of the vendor, not the maintenance of public order or the promotion of the public weal. It deals exclusively with the civil law and the only logical sanction to enforce the stipulation in favour of an aggrieved competitor would be to give him against the discriminating vendor a recourse in damages for compensation of any damage resulting from a refusal to sell to him at the same price goods of like quality and quantity. The penalty imposed amounts only to a colourable attempt to invade the provincial field.

Sections (*b*) and (*c*), on the other hand, are genuine criminal legislation, according to the above *criteria*.

I, therefore, say that Subsection (*a*) of Section 498A, with the penalties attached, does not come within the definition of Criminal Law and is *ultra vires;* Subsections (*b*) and (*c*) would be *intra vires* of the Parliament of Canada.

I would, therefore, answer the question in the negative as to the latter sections and in the affirmative as to subsection (*a*)—and I hereby certify my opinion and my reasons.

(*c*) Crocket J.

(*c*) Crocket, J.—It must, I think, be taken as established by the decisions of this Court and the Judicial Committee of the Privy Council that the Parliament of Canada cannot arrogate to itself any legislative jurisdiction, which it would otherwise not possess, in relation to any of the classes of subjects enumerated in s. 92 of the B.N.A. Act, by merely dealing with any such subject as criminal law under head 27 of s. 91; and that if, when examined, any legislation, though inserted in the Criminal Code, is found to deal with matters exclusively committed to the legislative jurisdiction of the provinces by s. 92, and not to be criminal in its essence, such legislation ought to be declared to be invalid. This principle was

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No. 12. Reasons for Judgment. (c) Crocket J.—*continued.*

clearly affirmed by the Judicial Committee of the Privy Council in its judgment in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), delivered by the present Chief Justice of this Court. In that case the Judicial Committee was considering an amendment to s. 508 of the Criminal Code, adding thereto a provision which declared it to be an indictable offence for any person to solicit or accept any insurance risk except on behalf of a company or association licensed under the Dominion Insurance Act, 1917. The Board held that the amendment was invalid, since, in substance though not in form, it was in regulation of contracts of insurance, subjects not within the legislative competence of the Dominion. The Right Honourable Mr. Justice Duff (as he then was) in delivering the judgment of the Board, after reviewing the relevant previous decisions of the Judicial Committee, including the *Board of Commerce* case (2), and quoting extensively from the judgment of the Supreme Court of the United States in *Hammer* v. *Dagenhat* (3), said at pp. 339 and 340 :

> It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the Insurance Act, and their Lordships think it not open to controversy that in purpose and effect s. 508C is a measure regulating the exercise of civil rights. But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation, the jurisdiction of Parliament, in relation to the Criminal law, is unlimited, in the sense, that in execution of its powers over that subject-matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done, and consequently that s. 508C, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.
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> The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

And later, at pp. 342 and 343 His Lordship added :

> And indeed, to hold otherwise would be incompatible with an essential principal of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, (4), was "not to weld the Provinces into one or to subordinate the Provincial Governments to a central authority," " Within the spheres allotted to them by the Act the Dominion and the Provinces are " as Lord Haldane said in *Great West Saddlery Co.* v. *The King* (5), " rendered in general principle co-ordinate Governments."
>
> Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

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(1) (1924) A.C. 328. (2) (1922) 1 A.C. 191. (3) (1918) 247 U.S. 251.
(4) (1892) A.C. 437. (5) (1921) 2 A.C. 100.

In the *Board of Commerce* case in 1921 the Judicial Committee considered the question of the validity of an order made by the Board of Commerce, under the Board of Commerce Act and the Combines and Fair Prices Act, enacted by the Dominion Parliament in 1919, restraining certain manufacturers of clothing in the city of Ottawa in respect of sale prices of their products. Parliament purported to authorize the Board of Commerce to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the provinces as the Board might consider to be detrimental to the public interest and to give the Board authority also to restrict accumulation of food, clothing and fuel beyond the amount reasonably required in the case of a private person for his household and in the case of a trader for his business, and to require the surplus to be offered for sale at fair prices. The Board was also authorized to attach criminal consequences to any breach of the Act which it determined to be improper. The Judicial Committee held that both these Acts were *ultra vires* the Dominion Parliament, since they interfered seriously with property and civil rights in the provinces, a subject reserved exclusively to the Provincial Legislatures by s. 92, and were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combinations and hoarding outside the heads of s. 92 and within the general power given by s. 91. Counsel for the Dominion in that case argued that the legislation fell under s. 91 (2): The regulation of Trade and Commerce, and also that it fell within s. 91 (27): The Criminal Law, etc. Both these contentions were rejected for the reasons stated. Dealing with the criminal law contention, Lord Haldane, in delivering the judgment of the Board said :—

> For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words " the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application.

The learned counsel for the Dominion in the present case strongly argued that the authority of both the *Board of Commerce* and the *Reciprocal Insurers* cases had been materially modified by the decision of the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1). I can find nothing in the judgment in the last-named case, as delivered by Lord Atkin, which detracts in any manner from the authority of either the Board of Commerce or the *Reciprocal Insurers*' case, as regards the interpretation of 91 (27).

The Board in the later case was dealing with the validity of this very section of the Criminal Code, as it stood in Revised Statutes of Canada, 1927, ch. 36, which made it an indictable offence, punishable by fine or

(1) (1931) A.C. 310.

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imprisonment, to conspire, combine or agree unduly to limit transportation facilities, restrain commerce or lessen manufacture or competition, as well as with s. 36, Revised Statutes of Canada, 1927, ch. 26 (The Combines Investigation Act), which made it an indictable offence punishable by fine or imprisonment to be a party to the formation or operation of a combine, as defined by s. 2, viz.: a combine " which is to the detriment of the public and restrains or injures trade or commerce." Lord Atkin at p. 317, as reported, said :—

> Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires;* nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. *But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class.* On this issue the legislative history may have evidential value.

And His Lordship, after setting out the history of the Act and of section 498, as it stood in the Revised Statutes, 1927, distinctly stated :—

> Their Lordships have dealt at some length with the provisions of the Acts of 1919 inasmuch as the appellants relied strongly on the judgment of the Board in *In re Board of Commerce Act,* 1919, which held both Acts to be *ultra vires.* Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute.

He then proceeded to point out that by the new Act combines were defined as combines " which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others," and which " are mergers, trusts or monopolies, so-called," or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport, or of fixing a common price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or " otherwise restraining or injuring trade or commerce." After reviewing the provisions of the Act, His Lordship added :—

> In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, " the criminal law including the procedure in criminal matters " (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected " which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others "; and if Parliament genuinely determines that commercial activities, which can be so described, are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. " Criminal law " means " the criminal law in its widest sense." : *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only *the quality* of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one : Is the act prohibited with

penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of " criminal jurisprudence "; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe J. that the passage in the judgment of the Board in the *Board of Commerce* case, to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of " criminal law " colourably and merely in aid of what is in substance an encroachment.

I do not think it can fairly be said that any of the passages which I have quoted at such length from Lord Atkin's speech were intended to disapprove of anything previously laid down in the judgments of the Board in either the Board of Commerce or the *Reciprocal Insurers'* case. The most that can be said is that Their Lordships agreed that the allusion which Lord Haldane made in the *Board of Commerce* case to Parliament exercising " exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence " was not intended as a definition of criminal law as used in 91 (27), and that the quoted reference was made merely for the purpose of illustrating the difference between Parliament legislating genuinely on a matter which was obviously one of criminal law and legislating on a matter which was merely a colourable attempt to encroach upon Provincial legislative jurisdiction. I think the same thing may be said of the observations which Lord Atkin himself made regarding the quality of a criminal act, that none of those observations were intended to lay down definitely the principle that the mere fact of Parliament prohibiting an act and attaching penal sanctions thereto must in all cases be taken as conclusive evidence of the criminal character of any legislation, the constitutional validity of which is called in question. Indeed, the whole judgment, in my opinion, indicates quite the contrary. One cannot read it throughout without seeing that the Board in that case itself considered very carefully the character of the legislation there under review in determining whether or not it was or was not genuine criminal legislation within the meaning of 91 (27). Indeed, the decision, in my opinion, far from modifying, actually confirms the principle laid down in the previous cases, as witness the statement that " one of the questions to be considered," in case of controversy between the two legislative powers " is always whether in substance the legislation falls within an enumerated class of subject or whether, on the contrary, in the guise of an enumerated class it is an encroachment on an excluded class."

I cannot therefore agree to the proposition that the jurisdiction of Parliament in relation to criminal law is plenary and that enactments

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passed within the scope of that jurisdiction are not subject to review by the courts, if by that it is meant to say that the courts have no right to review the quality and character of any legislation which Parliament chooses to place in the criminal code. Once it is determined that any such legislation in reality is of a criminal character, the courts of course will not presume to consider its wisdom or unwisdom, but in my opinion it is not only their right, but their clear duty to scrutinize any enactments, which are inserted in the criminal code, for the purpose of deciding whether they are or are not of such a quality or character as can properly be described as criminal law within the meaning of s. 91 (27). I can conceive of no other way in which a controversy as to legislative jurisdiction to enact a criminal law within the meaning of s. 91 (27) can properly be decided. If the mere fact of its enactment is itself to be regarded by the courts as conclusive, there would, as pointed out in the *Reciprocal Insurers'* case, be no class of civil rights over which the Parliament of Canada could not assume exclusive legislative control by the mere device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

Having examined the three subsections, which Parliament added to s. 498 of the Criminal Code, as we must do in order to determine their purpose and effect and answer the question, which the Governor in Council has submitted to us in regard to them, I have concluded that (*b*) and (*c*) allege offences which might reasonably be held to be of a criminal character, inasmuch as both require a specific intent to destroy competition or to eliminate a competitor—a thing which is bound in the end to operate to the detriment or against the interest of the public. The essential ingredient of the offence, as described in each of these subsections, is the intent to cause injury to the public or to an individual. They both, therefore, present on their face the characteristic feature of crime, viz.: the intent to do wrong. In this respect they are in marked contrast with (*a*), which purports to make it a crime for anyone to be a party to any transaction of sale, which discriminates to his knowledge against the 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 to such competitors in respect of a sale of goods of like quality or quantity. No intent to destroy competition or to eliminate an individual competitor is required. On the contrary its apparent object is to prevent the granting of discounts, rebates or allowances to large scale purchasers of manufactured and all other goods for any reason whatever and to make the price of commodities uniform, as far as possible, and by this expedient to raise retail prices throughout the country and thus to deprive the great mass of the consuming population of the benefit of real competition in trade. Such a policy may be desirable and beneficial to a particular class of the population, but its purpose and effect is purely economic and involves the virtual control by Parliament of such subjects as contracts of sale, which the B.N.A. Act has assigned to the exclusive jurisdiction of the Provincial Legislatures, which, in my judgment, if I may say so, are in a much better

position to deal with such subjects as matters of local and provincial concern than the federal Parliament. The crucial question, however, with which we are called upon to deal is as to whether such agreements as those described in (*a*) can legitimately be classed as falling under the head of criminal law. In my opinion s.s. (*a*) describes an act, which lacks every element of what is ordinarily associated with criminal law, either in the minds of lawyers or of laymen. It describes a thing which is neither civilly nor morally wrong in itself under the cloak of discrimination. I have no hesitation in saying that in my opinion it is not genuine criminal legislation and that, dealing as it does with a subject matter of such a character, its incorporation in the criminal code should be held to be a mere colourable attempt on the part of Parliament to encroach upon the legislative authority of the provinces.

In the Supreme Court of Canada.

No. 12. Reasons for Judgment. (*c*) Crocket J.—*continued.*

I shall, therefore, answer the question which has been submitted to us in respect of these enactments that s.s. (*a*) of 498A of the Criminal Code is *ultra vires* of the Parliament of Canada.

I certify the foregoing to be my opinion upon the question referred for the consideration of the Court with respect to the validity of s. 498A of the Criminal Code with my reasons for my answer thereto.

In the Privy Council.

No. 13. Order in Council granting special leave to appeal to His Majesty in Council, 26th September 1936.

No. 13.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BALMORAL.

The 26th day of September 1936.

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 29th day of July 1936 in the words following viz. :—

"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney-General of British Columbia in the matter of an Appeal from the Supreme Court of Canada in the matter of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact Section 498A of the Criminal Code being Chapter 56 of the Statutes of Canada 1935: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court dated the 17th June 1936 and for such further or other Order as to Your Majesty may appear fit:

In the Privy Council.

No. 13. Order in Council granting special leave to appeal to His Majesty in Council, 26th September 1936 —*continued.*

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and on behalf of the Attorney-General of Canada and the Attorneys-General of the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Alberta and Saskatchewan Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute an Appeal against the Judgment of the Supreme Court of Canada dated the 17th day of June 1936.

"And Their Lordships do further report to Your Majesty that the authenticated copy under Seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

A. H. L. HARDINGE.

Statutes and other Documents.

STATUTES AND OTHER DOCUMENTS.

No. 14.

No. 14.

Report of the Royal Commission on Price Spreads, Pages 1 to 506, April 9, 1935.

(*Separate document.*)

No. 15.

No. 15.

Section 498A of The Criminal Code, Statutes of Canada (1935), 25-26 George V, Chapter 56.

(*Separate document.*)

In the Privy Council.

No. 102 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact Section 498A of The Criminal Code, being Chapter 56 of the Statutes of Canada, 1935.

BETWEEN

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA - - - - - *Appellant*

AND

THE ATTORNEY-GENERAL OF CANADA and THE ATTORNEYS-GENERAL of the PROVINCES of ONTARIO, QUEBEC, NEW BRUNSWICK, MANITOBA, ALBERTA and SASKATCHEWAN - - - *Respondents.*

RECORD OF PROCEEDINGS.

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