No. 37.

IN THE SUPREME COURT OF CANADA.

IN THE MATTER OF THREE BILLS PASSED BY THE LEGISLATIVE ASSEMBLY OF THE PROVINCE OF ALBERTA AT THE 1937 (Third Session) THEREOF, ENTITLED RESPECTIVELY :

"An Act Respecting the Taxation of Banks";

"An Act to Amend and Consolidate the Credit of Alberta Regulation Act"; and

"An Act to Ensure the Publication of Accurate News and Information";

and reserved by the Lieutenant-Governor for the signification of the Governor-General's pleasure.

FACTUM OF THE ALBERTA PRESS.

SUBMITTED BY :

NORTHWESTERN PUBLISHERS LIMITED, a Dominion Company, publishers of the Edmonton Journal.

SOUTHWESTERN PUBLISHERS LIMITED, a Dominion Company, publishers of the Calgary Herald.

LETHBRIDGE HERALD COMPANY LTD., a Dominion Company, publishers of the Lethbridge Herald.

ALBERTA FREE PRESS LIMITED, a Provincial Company, publishers of the Edmonton Bulletin.

ALBERTAN PUBLISHERS LTD., a Provincial Company, publishers of the Calgary Albertan.

MEDICINE HAT NEWS LTD., a Provincial Company, publishers of the Medicine Hat News

and

the ALBERTA DIVISION, CANADIAN WEEKLY NEWSPAPERS ASSOCIATION, an organization comprising eighty weekly newspapers published in Alberta.

INDEX.

x G 23487—5 75 5/38 E & S

PART I.

STATEMENT OF FACTS.

This is a reference by the Governor-General-in-Council pursuant to the provisions of the Supreme Court Act of certain questions to the Supreme Court of Canada for hearing and consideration, among which questions is the following :

> Is Bill No. 9 passed by the Legislative Assembly of the Province of Alberta at the third session thereof, in 1937, entitled " An Act to

Insure Publication of Accurate News and Information " or any of the provisions thereof and in what particular or particulars or to what extent, *intra vires* of the legislature of the Province of Alberta ? (See* Case p.15 and p. 9, l. 8.)

*For " Case " read " Record " throughout.

PART II.

SUMMARY OF PRESS BILL AND OTHER BILLS AND ACTS.

Bill No. 9 above referred to was passed by the Legislative Assembly held in the Province of Alberta at its third session in 1937 and was by the Lieutenant-Governor of the Province reserved for the signification of the Governor-General's pleasure on October 5th, 1937, pursuant to Sections 90 and 55 of the British North America Act, 1867. Its terms will be more fully summarized presently, but as indicated in the Order of Reference, it is one of a series of Acts passed by the present Government of the Province with the avowed object of inaugurating in the Province a " new economic order " upon the principles or plan of the theory known as Social Credit. What these principles are and what this plan is, so far as can be gathered from the legislation, will be hereafter referred to, but speaking generally the Bill appears to look to and provide for the elimination of criticism of Government Social Credit policies and the prohibition of the dissemination of news not satisfactory to the Social Credit Government of Alberta concerning the activities of the government in connection with its Social Credit policy.

Some of these Acts are designed more to facilitate the introduction of the Social Credit plan rather than to be part of the plan itself. The Acts presently in force and proposed which are most closely connected with the plan itself are :

(*a*) The Alberta Social Credit Act (1937) first session, Chap. 10 (hereinafter referred to as " the Social Credit Act "). (Case p. 85.)

(*b*) The Bill to amend and consolidate the Credit of Alberta Regulation Act, 1937, being Bill No. 8, 3rd session, reserved (hereinafter referred to as " the Bank Bill "). (Case p. 11.)

(*c*) The Licensing of Trades and Businesses Act, 1937, 3rd Session, Chap. 1 (hereinafter referred to as " the Trades and Businesses Bill "). (Case p. 123.)

(*d*) The Bill presently being discussed (hereinafter referred to as " the Press Bill "). (Case p. 15.)

A

THE SOCIAL CREDIT ACT.

(Case p. 85.)

The Social Credit Act superseded the Social Credit Measures Act passed in the first session of 1936 as Chap. 5 (Case p. 29) and also the Alberta Credit House Act passed at the second session of 1936 as Chap. 1. (Case p. 35.)

The preamble to the superseded Social Credit Measures Act of 1936 may, however, usefully be referred to as explanatory of the Social Credit plan. This preamble (Case p. 29), after reciting that the present monetary system is

> " obsolete and a hindrance to the effective production and distribution of goods "

contains the following statement of the general objects of Social Credit principles,

> " being to bring about the equation of consumption to production and to afford to each person a fair share in the cultural heritage of the people in the Province." (Case p. 29, l. 23.)

The declaration in Sec. 2 (Case p. 30, l. 1.) of this superseded Act that

> " the people of the Province are entitled to the full benefit of the increment arising from their association "

is also of importance in this connection, as well as the provisions of Sec. 3 and Sec. 7 (Case p. 30, l. 3 and p. 30 l. 1) which empowers the Lieutenant-Governor-in-Council, after investigation as in the section set out, to

> ". . . adopt and put into operation any measures designed to facilitate the exchange of goods and services or any proposal which is calculated to bring about the equation of consumption to production and thus ensure to the people of the Province the full benefit of the increment arising from their association."

The superseded Alberta Credit House Act of 1936 (Case p. 35), made provision for the establishment of certain credit houses by the government designed to furnish the people entitled to what was called therein "Alberta credit " facilities for receiving the same.

The Social Credit Act (Case p. 85) repealed these two Acts. (Case p. 103, l. 27.)

By an amendment passed at the second session of 1937 (Chap. 3, Sec. 2 (b)) (Case p. 117, l. 9) " Social Credit " is defined as

> " the power resulting from the belief inherent within society that its individual members in association can gain the objectives they desire." (Case p. 117.)

The main Act (Case p. 85 at p. 86, l. 1.) after reciting (*inter alia*) that the

> " existing means and system of distribution and exchange of wealth is considered to be inadequate and unjust and not suited to the welfare, prosperity and happiness of the people of Alberta "

then provides for the appointment of a Board (Case pp. 88-89) whose functions are both administrative and advisory and of a " Provincial Credit Commission " (Case p. 89) of from three to five members who are to be appointed by the Board and to hold office for ten years unless removed by

the Board upon address of the Legislative Assembly. To this Commission is entrusted the duty of bringing into force in the Province the new economic order founded upon the principles known as Social Credit. So far as can be gleaned from a perusal of this Act and of the repealed Acts these principles seem to be, primarily, as follows:

(1) That there exists an "unused capacity of the industries and people of the Province of Alberta to produce wanted goods and services." (Sec. 2 a—Case p. 86, l. 9.)

(2) That this capacity is unused because of the lack or absence of purchasing power in the consumers in the Province; (preamble and s. 3 of repealed "Social Credit Measures Act," Case p. 30, l. 6), and

(3) That this purchasing power can be made to "conform to" the capacity of the people of the Province to produce wanted goods and services by the issuance of Treasury Credit Certificates against a Credit Fund or Provincial Credit Account established by the Commission each year representing the monetary value of this "unused capacity." (Secs. 5 (1) and 7—Case p. 89, l. 28, and p. 91, l. 25.)

This "unused capacity" is called by the Act "Alberta credit" (Sec. 2 (a)—Case p. 86, l. 8). It is issued and its use is authorized in various forms. It can be paid out monthly to those entitled to it in "per capita consumers' dividend" of not less than five per cent of the Provincial Credit Account (Sec. 18—Case p. 95, l. 30), or in making loans for certain purposes on which no interest is payable (Sec. 5, ss. 3—Case p. 90, l. 10); or it can be issued to consumers who buy goods at retail stores to the extent of the "retail discount rate" established by the Commission "without any extraneous influence and advice" (Sec. 5 (2)—Case p. 90, l. 4), which rate is to be "applicable to purchasers of goods and services from retailers" (Sec. 15 (1)—Case p. 94, l. 1).

The establishment of this "retail discount rate" is the subject of the somewhat complicated provisions of Sec. 14—Case p. 93, l. 7. The idea seems to be that there is to be a discount granted on the purchase of goods by retail to make up for the "*unused productive capacity*" of the population of the Province.

The other provisions of the Act are concerned chiefly with the setting up of machinery to carry out this vague and elusive economic plan.

The provisions of Sec. 6—Case p. 91, l. 13 are, however, useful as showing the unquestioning submission, indeed almost reverence, with which the activities and deliberations of the Commission are to be regarded. Subsection (b) of this section makes it unlawful for anyone (no matter how honestly)

"... to induce, or attempt to induce, any such member or employee (of the Commission) to make any decision or order, or to take any action with respect to any matter within the authority of the Commission;"

This provision when taken in conjunction with the penalty Section (s. 45—Case p. 103, l. 16) which makes any violation of the Act punishable with a fine of not more than $1,000 or imprisonment of not more than six months " or both " shows how absolute are the powers of the Commission and how repugnant to democratic institutions is the Government policy which seriously proposes to set up such a body. It is this policy which is to be the subject of the Board Chairman's self-promulgated statements which, the Bill provides, a newspaper must publish free of cost on pain of having the publication of the newspaper itself banned.

B

The Bank Bill

(Case, p. 11)

The Bank Bill is designed to supersede " The Credit of Alberta Regulation Act " passed at the second session in 1937 (Case, p. 111), which Act was disallowed by the Governor-General.

Section 9 of the Bank Bill (Case p. 15, l. 11) purports to repeal this disallowed Act. The recital of the Bill (at p. 11, l. 22) is as follows :

> " Whereas the extent to which property and civil rights in the Province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the Province and to the people collectively and individually of the Province."

It is not proposed to analyze this Bill in detail. Its design is that all institutions dealing in credit (other than transactions which are " banking " within the meaning of that word as the same is used in sub-head 15 of Sec. 91 of the British North America Act 1867, Case p. 12, l. 11) shall only operate in the Province under a yearly license from the Provincial Credit Commission constituted under the Alberta Social Credit Act as above described, and that every application for a license (Sec. 3, ss. 4—Case p. 12, l. 30)

> " shall be accompanied by an undertaking signed by the applicant whereby the applicant undertakes to refrain from acting or assisting or encouraging any person or persons to act in a manner which restricts or interferes with the property and civil rights of any person or persons within the Province."

Provision is made for the appointment of " one or more local Directorates to supervise, direct and control the policy of the business of dealing in credit " of the credit institutions. (Case p. 13, 1.20.) Such local Directorates shall consist of five persons, three of whom are to be appointed by the Social Credit Board instituted under the above described Alberta Social Credit Act (Case p. 85), and two by the institution involved. (Case p. 13, 1.29.) Carrying on business by any credit institution without

a license or violation of any of the provisions of the Act involves a penalty of $10,000 a day. (Sec. 5—Case p. 14, l.15.)

C

THE TRADES AND BUSINESSES ACT

(Case p. 123)

This Act applies to all trades, businesses, industries, employments and occupations carried on in the Province save such as are presently licensed under existing legislation, and save such professions and callings as are the subject of existing legislation. It does not, however, apply to farmers, ranchers, farm laborers or domestic servants or unskilled laborers nor to any business subject to the control of the Public Utility Commission, nor to any business or occupation exempted from its operation by the Lieutenant-Governor-in-Council. (Case p. 123, ll. 12-28.)

Generally speaking, it is an Act giving the Minister of Trade & Industry of the Province complete power, by a system of registration and licensing, over all persons or corporations carrying on any of the businesses or occupations to which it is made by the Minister to extend, insofar as their business or occupational activities are concerned. This appears from the fact that the Minister has by the Act the uncontrolled power, if he thinks it to be in the public interest, to refuse to allow any person or corporation to carry on a business or engage in an occupation covered by the Act (s. 8 (a)—Case p. 125, l. 32) and the minister may in his discretion suspend or cancel any subsisting license and refuse to issue a license to any person whose license has been cancelled. (Sec. 7—Case p. 125, l. 18.)

Very heavy penalties are imposed for the carrying on of business or engaging in occupations by any unlicensed person or corporation, as well as for contravention of any regulation made by the Minister. (SS. 5 and 6—Case p. 125, ll. 1-16.)

D

THE PRESS BILL

(Case p. 15)

The preamble recites that it is

> " expedient and in the public interest that the newspapers published in the Province should furnish to the people of the Province statements made by the authority of the government of the Province as to the true and exact objects of the policy of the government and as to the hindrances to or difficulties in achieving such objects to the end that the people may be informed with respect thereto."

Section 1 gives the name by which the Act may be cited as " The Accurate News and Information Act."

Section 2 (Case p. 15, l. 31) defines the word " Chairman " as meaning the Chairman of the Board constituted by Sec. 3 of the Social Credit Act

(Case p. 88, l. 1) and " newspaper " (Case p. 16, l. 1) as being a paper containing public news, etc., published periodically in parts or in numbers at regular intervals not exceeding thirty-one days between the publication of any two of such papers, etc.

Sections 3 and 4 are the principal sections (Case p. 16, l. 9).

Section 3 provides that the proprietor, etc., of any newspaper published in the Province shall

> " when required so to do by the Chairman publish in that newspaper any statement furnished by the Chairman which has for its object the correction or amplification of any statement relating to any policy or activity of the government of the Province published by that newspaper within the next preceding thirty-one days."

Subsections 2, 3, 4, 5, 6 and 7 of Sec. 3 (Case p. 16, l. 16 to p. 17, l. 3) make provision regarding the correcting or amplifying statement as to the type in which it is to be printed, its rank or prominence as to position in the newspaper and that it is to be published in the next regular issue of the paper after the day upon which the requirement for its publication is received at the newspaper office, also that it shall contain a certificate to the effect that it is published by the direction of the Chairman of the Social Credit Board and that it shall not contain any matter ordinarily published as advertising.

Section 4 (Case p. 17, l. 4) provides that the proprietor, etc., of any newspaper upon being required by the Chairman in writing, shall within twenty-four hours after the delivery of the requirement

> " make a return in writing setting out every source from which any information emanated as to any statement contained in any issue of the newspaper published within sixty days of the making of the requirement and the names, addresses and occupations of all persons by whom such information was furnished to the newspaper and the name and address of the writer of any editorial, article or news item contained in any such issue of the newspaper as aforesaid."

Section 5 (Case p. 17, l. 14) provides that no action for libel shall be maintainable on account of the publication of any statement pursuant to the Act.

Section 6 (Case p. 17, l. 19) provides that in the event of a proprietor, etc., of any newspaper being guilty of any contravention of any of the provisions of this Act, the Lieutenant-Governor-in-Council upon a recommendation of the Chairman may by order prohibit

> " (*a*) the publication of such newspaper either for a definite time or until further order;
>
> (*b*) the publication in any newspaper of anything written by any person specified in the order;
>
> (*c*) the publication of any information emanating from any person or source specified in the order."

Section 7 (Case p. 17, l. 29) provides for:

1. A penalty not to exceed $500 on every person who contravenes any of the provisions of the Act or who makes default in complying with any requirements made in pursuance of the Act.

2. A penalty not to exceed $1,000 on every person who contravenes any of the provisions of any Order-in-Council made under the Act.

3. That any penalty shall be recoverable either by suit brought by the Chairman or upon summary conviction upon the information of the Chairman or some person authorized in writing by him.

E

Other Acts and Bills

The Acts designed to facilitate the introduction of the Social Credit plan in the Province, other than those above described and other than the repealed Acts already described are as follows, and may be divided into the following classes:

1. Amendment to the Treasury Department Act of August 6th, 1937, Chap. 4, 2nd Session (Case p. 118).

2. Acts denying access to the Courts, being:—

(*a*) Chap. 16, 2nd Session, 1936; An Act to amend the Judicature Act, of September 1st, 1936. (Case p. 74.)

(*b*) Chap. 11, 1st Session, 1937 ; An Act Respecting Proceedings in respect of Debentures guaranteed by the Province of April 14th, 1937. (Case p. 104.)

Held ultra vires by Ewing, J. in *I.O.O.F.* vs. *Lethbridge Northern Irrigation District No.* 2, 1937, 3 W.W.R. 424. Appeal pending.

(*c*) Chap. 5, 2nd Session, 1937; An Act to amend the Judicature Act, of August 6th, 1937. (Case p. 119.)

Disallowed, August 17th, 1937.

(*d*) Order-in-Council of September 24th, 1937. (Case p. 120.)

Held ultra vires by Ives, J. in *Steen* vs. *Wallace*, 1937, 3. W.W.R. 654.

3. Acts for the Regulation of Trades and Industries, being:—

(*a*) Chap. 66, 1st Session, 1936; An Act to amend the Department of Trades and Industries Act, of April 7th, 1936. (Case p. 34.)

(*b*) Chap. 9, 2nd Session, 1936; An Act to amend the Department of Trades and Industries Act, of September 1st, 1936. (Case p. 68.)

4. Acts looking to the issue of a species of provincial currency called Prosperity Certificates, being:—

(*a*) Chap. 4, 2nd Session, 1936; An Act respecting Prosperity Certificates, September 1st, 1936. (Case p. 63.)

Repealed in effect—see below.

(*b*) Chap. 83, 1st Session, 1937; An Act to amend the Prosperity Certificates Act, of June 17th, 1937. (Case p. 110.)

Repeal in effect of Act of September 1st, 1936.

5. ACTS AFFECTING BANKS AND THEIR EMPLOYEES, being :—

(*a*) Chap. 1, 2nd Session, 1937; An Act to provide for the Regulation of the credit of the Province of Alberta, of August 6th, 1937. (Case p. 111.)

Disallowed August 17th, 1937.

(*b*) Chap. 2, 2nd Session, 1937; An Act to provide for the Restriction of the Civil Rights of certain persons, of August 6th, 1937. (Case p. 115.)

Disallowed August 17th, 1937.

6. ACTS REDUCING GOVERNMENT AND PRIVATE DEBTS, being :—

(*a*) Chap. 6, 1st Session, 1936; An Act respecting the Refunding of the Bonded Indebtedness of the Province, of April 7th, 1936. (Case p. 31.)

To come into effect on proclamation and not proclaimed.

(*b*) Chap. 2, 2nd Session, 1936; An Act to provide for the Reduction and Settlement of Certain Indebtedness, of September 1st, 1936. (Case p. 46.)

Held ultra vires by Ewing, J. in *Credit Foncier* v. *Ross*, 1937, 1 W.W.R., p. 376 and by Appellant Division of S.C. of Alberta, 1937, 2 W.W.R. 354.

(*c*) Chap. 3, 2nd Session, 1936; An Act to Amend and Consolidate the Debt Adjustment Act 1933, of September 1st, 1936. (Case p. 51.)

Repealed and re-enacted by Chap. 9, first session 1937. (Case p. 75.)

(*d*) Chap. 11, 2nd Session, 1936; An Act Respecting the Interest payable on Debentures and Other Securities of the Province, of September 1st, 1936. (Case p. 70.)

Held ultra vires by Ives J. in *I.O.O.F.* v. *Lethbridge Northern Irrigation District*, 1937, 1 W.W.R., p. 414. Act repealed April 14th, 1937.

(*e*) Chap. 12, 2nd Session, 1936; An Act Respecting the Interest payable on Securities of Municipalities, of September 1st, 1936. (Case p. 73.)

To come into effect on proclamation and not proclaimed.

(*f*) Chap. 9, 1st Session, 1937; An Act to amend and Consolidate the Debt Adjustment Act 1936, of June 17th, 1937. (Case p. 75.)

(*g*) Chap. 12, 1st Session, 1937; An Act Respecting the Interest payable on Debentures and Other Securities Guaranteed by the Province, of April 14th, 1937. (Case p. 105.)

Held ultra vires by Ewing, J. in *I.O.O.F.* v. *Lethbridge Northern Irrigation District No.* 2, 1937, 3 W.W.R. 424. Appeal pending.

(*h*) Chap. 13, 1st Session, 1937; An Act Respecting the Interest payable on Debentures and Other Securities of the Province, of April 14th, 1937. (Case p. 106.)

(*i*) Chap. 30, 1st Session, 1937; An Act to provide for the Postponement of the Payment of Certain Indebtedness, of April 14th, 1937. (Case p. 108.)

(*j*) Chap. 2, 3rd Session, 1937; An Act to amend the Debt Adjustment Act 1937, of October 5th, 1937. (Case p. 121.)

The first mentioned (ante p. 9, l. 17) amendment to the Treasury Department Act (Case p. 118) enables the government to deposit government funds not only in chartered banks but in any " other institution in the Province " as the Government may appoint, and this would, of course, include the Alberta Credit House established under the Social Credit Act. (Case pp. 96–98.)

The above mentioned Act (ante p. 10, l. 10) to provide for the Restriction of the Civil Rights of Certain Persons passed on August 6th, 1937 (Case p. 115) which was disallowed on the 17th of August, 1937, may be referred to as showing how the entire series of Acts is linked up in the Social Credit plan. The preamble (Case p. 115, l. 27) is as follows :—

" Whereas Bank Deposits and Bank Loans in Alberta are made possible mainly or wholly as a result of the monetization of the credit of the people of Alberta, which credit is the basis of the credit of the Province of Alberta; and

" Whereas the extent to which property and civil rights in the Province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the Province and to the people, collectively and individually, of the Province; and

" Whereas it is expedient that the business of Banking in the Province shall be controlled with the object of attaining for the people of Alberta the full enjoyment of the property and civil rights in the Province."

The Act then proceeds (Case p. 116, l. 14) to deprive any person engaged in the business of banking who is not licensed by the Provincial Credit Commission under the " Credit of Alberta Regulation Act " (Case p. 111) (then in force, but disallowed on August 17th, 1937) of all right to bring or defend any action in the civil courts of the Province.

The Bank Bill (Case p. 11) already described (ante p. 6, l. 10) which was reserved for the signification of the pleasure of the Governor-General takes the place of this disallowed Credit of Alberta Regulation Act. (Case p. 111.) A change made by the Bank Bill is to substitute for the words " banker and business of banking " in the earlier Act the words " credit institution " and " business of dealing in credit," and to exclude, in the

definition of the latter term, transactions which are banking " within the meaning of that word " in Section 91 (15) of the British North America Act. (Case p. 12, l. 11.)

The Order-in-Council of September 24th, 1937 (Case p. 120), amending the Rules of Court above referred to (ante p. 9, l. 30), was substituted by the Government for the amendment to the Judicature Act of 1937 (Case p. 119) which was disallowed as above mentioned. (Ante p. 9, l. 27.) This Order-in-Council purported to prohibit the Clerk or Registrar of the Court from filing or entering any Pleading or other proceeding questioning or contesting the constitutionality of any Act of the Province of Alberta or any regulation or order made thereunder. The amendment (Case p. 119) had prevented any action being taken in the Courts to test the validity of any Act in the Province without the permission of the Lieutenant-Governor-in-Council. This Order-in-Council (declared *ultra vires* by Ives, J. *Steen* v. *Wallace*, 1937, 3 W.W.R. 654) has been suspended until May 1st, 1938 by a later Order-in-Council.

PART III.

ARGUMENT.

A.

THE SUBJECT MATTER OF THE PRESS BILL IS NOT " PROPERTY AND CIVIL RIGHTS IN THE PROVINCE " (SUBSECTION 13 OF SECTION 92), NOR " A MATTER OF MERELY LOCAL OR PRIVATE NATURE IN THE PROVINCE " (SUBSECTION 16 OF SECTION 92). IT FALLS PROPERLY WITHIN THE GENERAL POWERS OF THE DOMINION PARLIAMENT UNDER SECTION 91.

1. It is submitted to be clear that the Press Bill is part of the Social Credit plan, and that in this aspect it is legislation coming within the purview neither of subsection 13 nor subsection 16 of section 92 of the B.N.A. Act.

> " Subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures, may in another aspect and for another purpose fall within the jurisdiction of the Dominion Parliament."
>
> *Hodge* v. *The Queen*, 9 *A.C. at p.* 130 ; 53 *L.J., P.C. p.* 1.
>
> " Before, however, considering how these other cases illustrate the principle thus expressed it may be well at once to state that by ' aspect ' must be understood the aspect or point of view of the legislator in legislating—the object, purpose and scope of the legislation. *The word may be said to be used subjectively of the legislator rather than objectively of the matter legislated upon.*"
>
> *Lefroy Legislative Power in Canada, p.* 394.

and see

> *O'Brien* v. *Royal George Co. Ltd.* 1921, 1 *W.W.R.*, 559, *per Harvey, C.J. at p.* 561.

where referring to provincial legislation dealing with the closing of " temperance bars " on Sunday Chief Justice Harvey after referring to the language of *Hodge* v. *The Queen* above referred to says :

> " *It may seem peculiar that the purpose rather than the effect of legislation should be the guide for determining its validity,* but it is too late now to doubt that legislation may be valid and effective if ancillary to a proper subject which would be invalid as principal legislation."

And see also

Citizens Insurance Co. v. *Parsons* 7 *A.C. at p.* 109 ; 51 *L.J., P.C. p.* 11 *at p.* 17.

> " The first question to be decided is whether the Act impeached in the present appeal falls within any of the classes of subjects enumerated in Sec. 92 and assigned exclusively to the legislatures of the provinces; for if it does not it can be of no validity for no other question would then arise."

See also—

Lawson v. *Interior Tree Fruit, etc.* 1931, *S.C.R.* 357, *at pp.* 371–2.

Per Duff, J. :

> " It is not necessary for the purposes of this appeal to determine whether or not this Statute could in its entirety be lawfully enacted by the Dominion Parliament alone. It is sufficient for our present purposes that in its characteristic and ruling provisions (the qualifying words in Sec. 10 being neglected) it aims at control of trade ' in matters of inter-provincial concern ' in such a degree as to exclude it from the category of legislation in respect of matters local in the provincial sense."

Per Newcombe, J. :

> " I thought there were two ways, either of which would serve to demonstrate the invalidity of the Act, and I had proposed to show independently of Sec. 91 that the legislation was neither ' property and civil rights ' nor ' private and local matters ' in the province : and consequently not within any of the provincial enumerations. . . . But seeing that the majority of the Court has reached practically the same result by the other route . . . I am content for the present purposes to leave the extent of the provincial field as defined by Sec. 92 unexplored."

2. All the Acts and Bills hereinbefore summarized (See Part II hereof) are part of a general plan to bring into force the new Social Credit economic order in the Province of Alberta. The Social Credit Act (Case p. 85) contains the principles and machinery of this plan; the Bank Bill (Case p. 11) is designed to give the Government control of credit institutions in

the Province; the Trades and Businesses Act (Case p. 123) is designed to give the Government control of practically all trades and business activities in the Province; the Press Bill (Case p. 15) is designed to give the Government control of newspaper publicity; and the Acts and Order-in-Council denying access to the Courts (Case pp. 74, 104, 119, 120—ante p. 9, l. 3) are designed to prevent the possibility of any government legislation, including legislation of the character above mentioned, being challenged in the Courts.

The " policy of the government " referred to in the preamble to the Press Bill (Case p. 15, l. 21) regarding which the people of the Province are to be informed from the Government's standpoint, is the Social Credit policy of the Government. The administration of the Press Bill is in the hands of the Chairman of the Social Credit Board. This official is given complete and autocratic powers by the Bill (See Sections 2, 3, 4, 6, and 7—Case pp. 15–17).

The provisions of Sec. 6 ss. (b) of the Social Credit Act (Case p. 91, l. 18) making it unlawful for anyone to attempt in any way to influence any member or employee of the Provincial Credit Commission, and the provisions of Sec. 5 (2) (Case p. 90, l. 6) requiring the retail discount rate to be established by a Commission " without any extraneous influence and advice " are along the same lines as the policy behind the Press Bill of preventing any criticism of government policy or news not satisfactory to the government of its Social Credit activities. The Social Credit Board is also the body to whom the administration of the Bank Act is in effect delegated. (Case p. 13, ll. 22, 30.) While some powers are exercisable by the Provincial Credit Commission (Case pp. 12-15) the Commission is the creature of the Board (Case p. 89, l. 9).

The entire series of Acts in Part II summarized is, as stated in the Order of Reference, " more or less directly relating to the policy of effectuating the object hereinbefore recited "— *i.e.*, the object of inaugurating in the Province " a new economic order upon the principle or plan of the theory known as Social Credit."

This plan, as shown by the Acts summarized, looks to the creation of a provincial medium of exchange in the place of money to be used for the purposes already described, and the use of which within the province is to be induced or compelled through the Government's control of all business activities and of the press.

It is submitted that the Press Bill in its aspect as part of this policy and plan is outside the category of legislation in relation to " property and civil rights in the Province " or " matters of merely local or private nature in the Province " for the following among other reasons :—

(a) Its object is to introduce and bring into effect a new economic and governmental order in one province of the Dominion. This affects not only the legislative and economic rights of the other Provinces and of the Confederation, as constitutional entities, but it also affects these rights as assured to individuals both in their quality as inhabitants of their respective Provinces and also in their common and larger status as citizens of Canada.

(b) Taken with the other legislation and governmental Acts set out in the Case, the Press Bill appears, not as a substantive bill dealing with the subject of accurate news, but as an ancillary measure enacted as a part of the mechanics of setting up this new economic and governmental order and system allegedly affecting only the people of Alberta, but conflicting with the principles on which the relations between the Provinces and the Dominions are based, and consequently affecting vitally the national interests and life of the Dominion. The Legislature of Alberta, by this series of legislative enactments, some of which are clearly *ultra vires*, some of which have been disallowed by the Federal authorities, and some of which have been reserved for signification of the pleasure of the Governor General, has created a schism between the Province of Alberta, one of the members of Confederation, as represented by its Government, and the Federation as a whole as represented by the Government of Canada.

So intense and direct has this attack on the Constitution become that the Legislature of Alberta as part of its programme went so far as to pass an Act with the object of preventing access to the Courts to test the constitutionality of their legislation.

> See—*Chapter* 5, *Acts of Alberta* (*2nd Session*) entitled "An Act to Amend the Judicature Act," assented to August 6th, 1937 (Case, p. 119).

When this Act was disallowed by the Federal authorities the same objective was sought by the passing of the Order-in-Council dated September 24th, 1937, containing the extraordinary provision prohibiting the Clerk or Registrar of the Court from filing or entering any proceeding, questioning, or contesting of the constitutionality of any Act of the Legislature of Alberta (Case p. 120).

In " pith and substance " then the Press Bill is revealed simply as one of the figures in the general pattern of an attempt by a Provincial Legislature to legislate without regard to its constitutional powers and to make any usurpation of the Federal Legislative field effective by controlling newspaper publicity and by closing the Courts to any who seek to challenge by proper proceedings at law, this assumption of legislative authority. If such an attempt were successfully upheld the B.N.A. Act would obviously be a dead letter, the foundations of confederation would be destroyed and the super-structure of " order and good government " laboriously built thereon would be in ruins.

This is a matter, it is submitted, not merely of a local or private nature, but of transcendent national interest and importance and where property and civil rights are affected far beyond the bounds of the Province.

See per Lord Watson in :

> *Attorney General for Ontario* v. *Attorney General for the Dominion*, 1896, A.C. 348, at p. 360; 65 L.J., P.C. p. 26 at p. 33.
>
> " Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the

body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local and provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."

The above passage was cited with approval in—

Attorney General of Canada v. *Attorney General of Ontario*, 101 L.J., P.C. p. 1 at p. 8 (the Aviation case).

In that case the subjects of national interest and importance were referred to particularly by Lord Sankey, in the second of his four propositions, where he says :—

" The general power of legislation conferred upon the Parliament of the Dominion by Section 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 entrench on any of the subjects enumerated in Section 92 as within the scope of Provincial legislation, *unless these matters have attained such dimensions as to affect the body politic of the Dominion.*"

(*c*) Debts and securities owed and held outside the Province to a much greater extent than inside the Province, and oftentimes to creditors not within the legislative ambit of the Province have been either repudiated or the interest thereon has been cut down.

See—Crédit Foncier v. *Ross*, 1937, 2. W.W.R., 354.

(*d*) The denial of access to the Courts of the Province is a matter of extraprovincial concern.

(*e*) The legislation deals with banks and credit institutions incorporated by the Dominion of Canada, operated extraprovincially as well as within the Province.

(*f*) The potential prohibition of publication of newspapers published by companies incorporated by the Parliament of Canada and whose operations extend outside of the Province is a matter of extraprovincial concern and is submitted to be of national concern and importance within the language of Lord Watson and Lord Sankey, cited above (ante p. 16, ll. 1-32).

(*g*) The interference with the dissemination of news from the Province to the Dominion at large is submitted to be not a matter of property and civil rights in the Province alone and not a matter of a merely local or private nature in the Province.

3. The subject matter of the Press Bill, taken by itself and apart from the related legislation, is not, it is submitted, property and civil rights in the Province nor a matter of a merely local or private nature in the Province.

It is contended here that " civil rights " as used in section 92 are matters of private law prescribing the relations between subject and subject, and not matters governed by public law which prescribes the relation between the Government and the subject; matters of a private nature are equally to be distinguished from matters of public law.

Useful comparison can be made between the use of the phrase " property and civil rights " in subsection 13 of section 92 of the B.N.A. Act and in the Quebec Act (1774) (14 Geo. III c. 83). (*See Kennedy's Constitutional Documents, p.* 134.)

The Quebec Act preserved to Canadian subjects in Quebec the enjoyment of their

> " Property and Possessions . . . and all other their Civil Rights,"

and provided that

> " in all Matters of Controversy relating to *Property and Civil* Rights, Resort shall be had to the Laws of Canada as the Rule for the Decision of the same."

Lareau emphasizes the distinction between public law which became imposed by reason of the conquest and private law (*i.e.* relating to civil rights) which the inhabitants retained notwithstanding the conquest. He says—

> " *Histoire du Droit Canadien,*" Vol. 2, p. 54—
>
> " Le changement de domination, subi en 1760 par la conquete et en 1763 par la céssion definitive du Canada à l'Angleterre, a introduit dans la colonie le droit public anglais. Le droit public et politique du vainqueur rémplace le droit public de la nation conquise, quand bien même elle conserverait son droit privé."

These civil or private rights, to the extent preserved by the Quebec Act, were kept in force by Section XXXIII of the Constitutional Act of 1791 (dividing Quebec into Upper and Lower Canada)

> (14 *Geo. III c.* 31.) (*See Kennedy's Constitutional Documents, p.* 214.)

and again at the time of the Union by section XLVI of the Union Act of 1840.

> (3 *and* 4 *Victoria, c.* 35.) (*See Kennedy's Constitutional Documents, p.* 547).

For an interpretation of the term " civil rights " in the law of Canada as brought into force by the Quebec Act

> *see* Mignault " *Droit Civil Canadien,*" Vol. I, p. 8, note 2,

where he distinguishes between private and public law and points out that civil law is synonymous with private law, from which, by necessary implication, it is submitted that civil rights arising under civil law are private rights as distinguished from public rights.

Mignault says :—

" Je donne ici aux mots *droit civil* leur sens historique et scientifique, mais je dois faire remarquer qu'aujourdhui, dans la science actuelle du droit, comme dans la pratique, les mots *droit civil* se prennent, par opposition aux mots *droit public.* Le droit civil, c'est le *droit privé.*—On le prend aussi quelquefois par opposition au droit commercial, ou encore par opposition au *droit criminel.*"

and again at p. 9 :—

" Le droit public regle les rapports des particuliers avec l'Etat; le *droit privé,* les rapports des particuliers entre eux.

En d'autres termes, les lois qui conferent des droits ou imposent des devoirs aux particuliers envers l'Etat forment le droit public. Telles sont les lois qui sont relatives à la distribution des pouvoirs, à l'organisation de la puissance publique, celles qui reglent les élections ou qui determinent les conditions necessaires pour être admis aux emplois publics, toutes celles aussi qui ont pour objet la repression des attentats aux bonnes moeurs et à la sûreté de l'Etat."

In 1792, after the Constitutional Act of 1791, the Legislature of Upper Canada substituted the laws of England for the laws of " Canada "

" in all matters of controversy relative to property and civil rights."

(32 *Geo. III.*) *See Kennedy's Constitutional Documents, p.* 227.)

Thus exactly the same phrase is employed in the Quebec Act to denote the subjects to which the law of " Canada " was to apply and in the 1792 Act to denote the subjects to which the law of England was to apply.

(It has some significance that the reservations contained in the 1792 Act, which saved certain existing rights from the operation of the Act, referred only to private rights such as title to land and rights under contract.)

Likewise the B.N.A. Act, in section 92, subsection 13 and also section 94 perpetuated the phrase " property and civil rights."

The identity of scope and meaning of the phrase " property and civil rights " as used in the Quebec Act, and in the B.N.A. Act, sections 92 and 94, is shown in the following passages from the Privy Council decision delivered by Sir Montague Smith in *Citizens Insurance Company of Canada* v. *Parsons* 7 A.C., at p. 110; 51 L.J., P.C. at p. 18

" The provisions found in section 94 of the British North America Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides as throwing light upon the sense in which the words ' property and civil rights ' are used. By that section the Parliament of Canada is empowered to make provision for the uniformity of any

laws relative to ' property and civil rights ' in Ontario, Nova Scotia and New Brunswick, and to the procedure of the Courts in these three provinces, if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law, as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words ' property and civil rights ' are obviously used in the same sense in this section as in No. 13 of section 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity.

.....

" It is to be observed that the same words, ' civil rights,' are employed in the Act of 14 Geo. 3, c. 83, which made provision for the government of the province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words ' property ' and ' civil rights ' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one."

The point that " civil rights in the Province " have regard mainly to the relations of citizens as between each other is clearly set out in the judgment of Chancellor Boyd in the case of:

Re North Perth; Hessin v. Lloyd, 21 *O.R. p.* 538.

The learned Chancellor was dealing with a contention that Dominion legislation regarding the franchise entrenched upon " property and civil rights in the Province." He says at p. 542—

" Ontario has her own like sphere of the electoral legislation provided for in section 84 of the same Act. Neither interferes with the other, because they occupy different planes of political territory, but both are essential for the efficient working of the Canadian system of dual government.

" The subjects of this class of legislation are of a *political* character, dealing with the citizen as related to the Commonwealth (whether province or dominion), and they are kept distinct in the Federal Constitutional Act from matters *of civil rights in the Provinces which regard mainly the meum and tuum as between citizens.* It is in my view rather confusing to speak of the right of voting as comprehended under the ' civil rights ' mentioned in sec. 92 sub-s. 13 of

the B.N.A. Act. *This franchise is not an ordinary civil right; it is historically and truly a statutory privilege of a political nature, being the chief means whereby the people, organized for political purposes, have their share in the functions of government. The question in hand, therefore, falls within the category not of 'civil rights in the Province' but of electoral rights in Canada.*"

Applying the foregoing to the Press Bill, it is submitted that the subject matter of the Press Bill is in its substance a matter of public law having to do with the relations between the Government and the subject, and is not concerned with civil rights under section 92, subsection 13, which regards the " meum and tuum as between citizens."

Assuming, however, for the purpose of argument that the subject matter of the Press Bill did fall within the category of civil rights, it is, it is submitted, not property and civil rights *in the Province.*

Here it is contended that the words " in the Province " are not used as indicating the geographical ambit, but rather the Provincial character of the rights referred to, in other words, they refer to the rights of individuals *qua* inhabitants of the Province as distinguished from their rights *qua* citizens of Canada.

This conception of rights appertaining to the inhabitants of a Province in two capacities is brought out when what may be called the " fundamental rights " of democratic citizenship are considered. Inherent rights expressed in such wide and general terms as " personal liberty," " freedom of speech," " freedom of the Press," and " freedom of assembly " are all rights which, by the very conception of citizenship under the Confederation, must, it is submitted, be uniform throughout the Dominion and not capable of being so impaired by any one Province as to degrade the quality of citizenship in that Province as compared with the other Provinces of Canada.

It is hard to conceive that the rights and liberties enjoyed by the citizens of Canada in these respects are to be less ample in one Province than in another. As was recently suggested to the Rowell Commission, take an extreme case and assume the passing of a Provincial Statute introducing slavery in one Province. While it might be contended that it fell within the Provincial power to legislate regarding civil rights, it would, it is submitted, be regarded as extending beyond civil rights *in the Province* (i.e., Provincial civil rights) since it would drastically curtail the full rights of citizenship of the subject as a citizen of the Dominion. Such a statute would, therefore, it is submitted, be *ultra vires.*

The rights of citizens of the Dominion to have the benefit of the news and views of a free Press are equally, it is submitted, rights which are not merely civil rights *in the Province* but are rights appertaining equally to all citizens of the Confederation which can only be impaired or denied under the authority of the Dominion Parliament.

Ample power to legislate regarding these basic elementary rights is contained in the plenary residuary authority conferred on the Dominion by the opening words of Section 91.

Assuming again for the purpose of argument that the Press Bill could be said to affect property and civil rights, it is submitted that it exceeds and extends beyond property and civil rights when that phrase is qualified by the words "*in the Province.*" Here the limitation imposed by the words "*in the Province*" is assumed to apply to the geographical ambit of the rights referred to as indicated by the location of those whose rights are affected.

In this conception the operation of the Press Bill is not confined to rights "in the Province." It affects civil rights beyond the Province— that is to say, it operates to deprive the public of Canada of the news and views of newspapers in Alberta relating to Governmental policies which are also the concern of the rest of the Dominion. Citizens all over Canada have a vital interest in having full information and comment regarding the policies of the Alberta Government and regarding events in that Province which would ordinarily be the subject of Alberta newspaper news items and articles.

As already submitted, the right of the public of Canada to have the benefit of a free Press is a right of the citizens as a whole, and is not limited to those within the boundaries of any one Province.

News is not a commodity which is confined within geographical boundaries nor is the dissemination of news to be confused with the production or sale of a commodity within the Province which might or might not be sold outside the Province. News in its ambulatory aspect as well as in its cultural and intellectual impact on national life is entirely different from physical commodities. Citizens from Halifax to Vancouver form their opinions and determine the nature and extent of their activities influenced in no small degree by events which may be happening in other Provinces.

The test is not to be confined to Alberta. The test is equally whether, in Provinces where there are large metropolitan dailies or weeklies which have extensive circulation in other Provinces and throughout the Dominion, it could be said to be affecting only property and civil rights *in the Province* (if it is property and civil rights at all) to prohibit the publication of these papers and thus arbitrarily to dry up the stream of news to readers far beyond the bounds of the Province. It is submitted that such legislation cannot be said to be authorized either under property and civil rights *in the Province* or matters of a merely local or private nature *in the Province.*

If one newspaper in the Province of Alberta can under Alberta Legislation be ordered to cease publication or to cease to publish news items or articles from an unlimited number of named sources or authors, then it follows that all the newspapers in the Province of Ontario or Quebec or Manitoba or British Columbia, for instance, could be forced to cease publication under Acts of the Legislatures of those Provinces, with consequent impairment of the sources of information of the nation as a whole regarding events, the knowledge of which is necessary for a proper appreciation of Canadian problems and an intelligent consideration of individual action and of national policies.

6. The considerations already mentioned in the next preceding paragraphs 3, 4 and 5 show, it is submitted, that the subject matter of the Press Bill is not a matter of a merely local or private nature in the Province.

B

THE SUBJECT MATTER OF THE PRESS BILL FALLS WITHIN THE EXCEPTION TO SUBSECTION 10 OF SECTION 92 OF THE BRITISH NORTH AMERICA ACT WHEREBY " OTHER WORKS AND UNDERTAKINGS CONNECTING THE PROVINCE WITH ANY OTHER OR OTHERS OF THE PROVINCES, OR EXTENDING BEYOND THE LIMITS OF THE PROVINCE " ARE EXCLUDED FROM THE JURISDICTION OF THE PROVINCIAL LEGISLATURE.

1. It is now settled that the " works and undertakings " referred to need not be entirely physical.

See per Viscount Dunedin in

Attorney-General of Quebec v. *Attorney-General of Canada* (the Radio case) (1932) L.J., P.C. at p. 97—

> " Broadcasting is a system which cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other."

at p. 98—

> " ' Undertaking ' is not a physical thing but is an arrangement under which of course physical things are used. Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking ' connecting the Province with other Provinces '—and ' extending beyond the limits of the Province'. "

2. Again it is emphasized that news is not a commodity, and it is submitted that, like broadcasting, it is the transmission of information and comment utilizing the physical instrumentalities of the printing press, the medium of transmission in the form of the completed newspaper, the telegraph and the radio for the dissemination of news articles from the newspapers, and the mail by rail, air, or water for the transmission of the newspaper itself and its receipt by readers in all parts of Canada. This, it is submitted, constitutes a work or an undertaking connecting the various provinces.

3. It is also emphasized again that, in visualizing the nature and extent of this alleged interprovincial work or undertaking, it is entirely relevant to consider, not only the situation in Alberta, but also in provinces where there are large metropolitan dailies and weeklies circulating over a large part of Canada, for instance, in Quebec, Ontario, Manitoba and British Columbia where the extraprovincial circulation of papers published there is large. While the extent of the circulation does not alter the principle, it does bring out the magnitude and importance of the newspaper

Press enterprise as a genuine interprovincial work or undertaking within the meaning which these words have been given by the Judicial Committee.

4. The circulation within and outside the Province cannot, it is submitted, be separated,—in other words, the right to publish the newspaper Press cannot as to its circulation in the Province of publication be under provincial legislative jurisdiction and as to its circulation outside the Province under Federal legislative jurisdiction, nor can it be under the distinctive provincial legislative jurisdictions of each different Province in which it circulates. In that connection the following extract from :

Toronto Corporation v. *Bell Telephone Company of Canada*, 74 L.J., P.C. at p. 24, (1905) A.C. p. 52

which was cited with approval in the *Radio* case appears pertinent. Lord Macnaghten said—

> " It was argued that the Company was formed to carry on and was carrying on two separate and distinct businesses—a local business and a long-distance business, and it was contended that the local business and the undertaking of the Company so far as it dealt with the local business fell within the jurisdiction of the Provincial legislature. But there again the facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of railway communicating with distant places."

The newspaper Press can be said to be a communication utility extending across the whole Dominion.

So also news items coming into Alberta from outside are themselves part of this interprovincial undertaking and it is to be remembered that such dispatches may deal with the activities or policies of the Alberta Government and thus themselves lead to exactly the same consequences under the Press Bill so far as amplifying statements, furnishing of authors and sources, banning of publication, banning of writers, fines and possible imprisonment in default of payment, are concerned.

C

The Press Bill is an invasion of the exclusive right of the Dominion to legislate in relation to the Criminal Law. (B.N.A. Act, Section 91, Sub-Sec. 27.)

1. It is common ground that the three companies, Northwestern Publishers Limited, Southwestern Publishers Limited, and the Lethbridge

Herald Company Limited, on whose behalf (*inter alia*) this factum is submitted, which companies respectively publish the Edmonton *Journal*, the Calgary *Herald*, and the Lethbridge *Herald*, were incorporated under The Companies' Act of the Dominion, the first two on September 25th, 1936, and the last on November 2nd, 1936, with appropriate publishing powers; that these companies respectively own the papers referred to; that these papers are " newspapers " within the meaning of the Press Bill; and that in the charter of each of such companies there appear the following words, " . . . the operations of the company to be carried on throughout the Dominion of Canada and elsewhere."

2. It is submitted that the " true nature and character " of the Press Bill,

(*Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96; 51 L.J., P.C. p. 11)

its " pith and substance ",

(*Union Colliery Co.* v. *Bryden* 1899 A.C. 580; 68 L.J., P.C. p. 118) is that it is Criminal Law.

" What the legislature is really doing "

(per Duff, J. *in Attorney-General for Ontario* v. *Reciprocal Insurers*, 1924 A.C. at p. 337; 93 L.J., P.C. p. 137)

is preventing newspaper criticism of the Social Credit policy of the Government or the activities of the Government in relation to the same and preventing the publication of news not satisfactory to the Government in connection with such policies and activities by making it an offence punishable by heavy monetary penalties and by possible prohibition of publication for any newspaper to do these things.

(a) The preamble to the Bill (Case p. 15, l. 21) shows that the Legislature is dealing with a matter of public interest and that the Bill is aimed at what is regarded by the Legislature as a public wrong. This preamble states that it is " expedient and in the public interest " that newspapers published in the Province do certain things and the Bill goes on to compel the newspapers to do these things under heavy penalties.

The preamble of an Act is " a key to open the minds of the makers of the Act and the mischiefs which they intend to redress."

See—*Commissioners of Income Tax* v. *Pemsel* 1891, A.C. 543, 61 L.J.Q.B. 265—per Lord Halsbury;

See—per Sir Lyman Duff, C.J., *In re Maritime Freight Rates Act* 1933, S.C.R. p. 432.

" . . . the Maritime Act by the general declaration of policy in its preamble, left little room for doubt as to the governing purpose of it. . . ."

See also—*British Coal Corporation* v. *The King*, 1935 A.C. at p. 500; 104 L.J.P.C. 58.

In this case not only the preamble to the Statute of Westminster was referred to, but even the report of the Imperial Conference which was mentioned in the preamble was quoted.

See also- -Canadian National Railways v. *Province of Nova Scotia* 1928—S.C.R., p. 122.

"The report of the Royal Commission was not referred to in argument; although strictly in view of the preamble it would not be improper to consult it."

(*b*) Section 3 (p. 16, l. 9) indicates that it is not every day news on private matters which the Act is referring to, but on the contrary it is statements relating to public matters—*i.e.*, statements relating to any policy or activity of the Government of the Province.

(*c*) Section 4 (Case p. 17, l. 4) requiring disclosures of authors and sources of information, while not restricted to articles and news on Government subjects, is clearly ancillary to the general policy of the Bill regarding alleged public wrongs—*i.e.*, prescribing the nature of published statements regarding public policies and activities of the Government.

(*d*) Section 5 (Case p. 17, l. 14) which prohibits an action for libel on account of the publication of any statement pursuant to the Bill, further indicates that the Bill is dealing with alleged public wrongs, inasmuch as by it a person who is libelled by the dictated statement is deprived of his civil remedy in the Courts, and the only reasonable justification which might be suggested for such legislation would be that it was necessary in connection with the correction of public wrongs.

(*e*) The whole machinery of the Bill is under the initiative and control of the Chairman of the Social Credit Board, who is a public officer. Thus showing that it is public wrongs rather than private rights which are being dealt with.

See Sec. 2 (Case p. 15, l. 31.).
Sec. 3 (Case p. 16, ll. 11, 17, 25 and 26).
Sec. 4 (Case p. 17, l. 5).
Sec. 6 (Case p. 17, l. 21).
Sec. 7 (Case p. 18, ll. 4 and 5).

3. The term "criminal law," as used in Section 91, subsection 27 of the B.N.A. Act, is to be construed in its widest sense.

See—Attorney-General for Ontario v. *Hamilton Street Railway et al.*, 1903 A.C. p. 524; 72 L.J.P.C. p. 105.

per the Lord Chancellor (Earl of Halsbury):—

"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 than the language itself affords. Section 91, subsection 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."

See also—

Russell v. *The Queen*, 7 A.C., p. 829; L.J.P.C. p. 77 :—

" Laws of this nature (' Canada Temperance Act ') designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights."

See also—

Ouimet v. *Bazin*, 46 S.C.R., p. 502 at p. 506.

where the following authority is quoted by the Chief Justice (Sir Charles Fitzpatrick) :—

" Austin tells us, Jurisprudence, Lect XXVII :—

" In short, the distinction between private and public wrongs or civil injuries and crimes would seem to consist in this :—

Where the wrong is a civil injury, the sanction is enforced at the discretion of the party whose right has been violated.

Where the wrong is a crime, the sanction is enforced at the discretion of the Sovereign."

His Lordship the Chief Justice goes on to say :—

" In what respect can it be said that working on Sunday or attendance at theatrical performances or excursions on that day, the things that are forbidden, constitute a civil injury against a private individual for which he has a remedy ? "

Applying the above extracts to the Press Bill how can it be said then that publishing reports of or comments on Government policy and activity constitutes a civil injury against a private individual for which he has a remedy ?

See also—

Proprietary Articles Trade Association v. *Attorney-General of Canada*, 1931 A.C. per Lord Atkin, at p. 324; 1931, L.J., P.C., p. 84, at p. 90.

" Criminal law is not confined to what was criminal by the laws of England or of any Province in 1867. The power must extend to legislation to make new crimes. 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 . . ."

4. The subjects of critical comments on Government policies—*i.e.*, " seditious " or " political " libel and of " spreading false news " have long been recognized as within the sphere of criminal law and were so recognized before Confederation.

A history of the crime of " seditious " libel or " political " libel, shows that down to the time of the passing of Fox's Libel Act, criticism of the Government constituted the crime of seditious libel.

Details of the legal developments relating to this offence are contained in Appendix I (post pp. 38 to 45).

(*a*) Regarding seditious libel, or criticism of governments, the following is a brief outline of these developments :—

The theory which was the basis or foundation of governmental action in this regard is described in the quotation from Stephen's History of the Criminal Law mentioned at p. 123 of *Crankshaw's Criminal Code* 6th Ed. as follows :—

" If the ruler is regarded as the superior of the subject as being by the nature of his position presumably wise and good, the rightful ruler and the guide of the whole population, it must necessarily follow *that it is wrong to censure him openly*; that if he is mistaken his mistake should be pointed out with the utmost respect, and that whether mistaken or not, no censure should be cast upon him likely or designed to diminish his authority."

See also—

Stephen's History of the Criminal Law, Vol. 2 at p. 348 :

" The first question to be considered is, what in the latter part of the eighteenth century was the proper definition of a seditious libel? Omitting technicalities, I think it might at that time have been correctly defined *as written censure upon public men for their conduct as such, or upon the laws, or upon the institutions of the country.* This is the substance of Coke's case, ' De libellis famosis,' which is the nearest approach to a definition of the crime with which I am acquainted. It was a definition on which the Star Chamber acted invariably, and which was adopted after the Restoration by the Court of King's Bench. It is in harmony with the whole spirit of the period in which it originated, and in particular with the law as to the licensing of books and other publications which then and afterwards prevailed. It was in substance recognized and repeated

far into the eighteenth century and was never altered by any decision of the Courts or any Act of Parliament."

See also—

Stephen's History of the Criminal Law, Vol. 2 at pp. 317–318 referring to the case of one Tutchin, convicted of libel for articles in a periodical called the " Observator." Stephen says that these articles—

> ". . . in these days would be described as opposition articles. They said, in substance, that the ministry was corrupt and the navy ill managed. Lord Holt was the presiding Judge . . ."

Lord Holt's charge to the jury is quoted as follows :—

> " And nothing can be worse to any government than to endeavour to *produce animosities as to the management* of it; *this has always been looked upon as a crime and no government can be safe without it is punished.*"

These citations and the fuller history of the development of the law of seditious libel set out in Appendix I (post pp. 38 to 45) demonstrate that the crime of seditious libel or political libel as originally understood and acted upon from early times down to comparatively modern times was the very thing which the Bill under discussion is essentially purporting to deal with. They show that the wrong aimed at by the Bill is and always was of an essential criminal nature dealt with by criminal procedure, and for which exceedingly heavy penalties were imposed. The fact that the offence, under the Bill, is the refusal to publish a " cut and dried " article prepared and furnished by a Government official purporting to be with the object of " correcting or amplifying " a previous newspaper article relating to Government policy or activity does not, it is submitted, alter the intrinsically punitive and harrassing character of the legislation.

It is submitted that legislation which requires a newspaper under heavy penalties to correct or amplify in prescribed words an alleged incorrect or incomplete statement regarding governmental policy or alleged inaccurate news regarding governmental activities is of the same intrinsic character as the legislation of former days making it a crime for a newspaper to publish critical statements of governmental policy or inaccurate news of governmental activities.

(b) So too the offence of publication of false news was dealt with as a crime as early at least as the days of Edward I.

> See notes to the case of *The King* v. *Hoaglin*, 12 Criminal cases p. 226.

and a citation therein from

> Stephen's History of Criminal Law, Vol. II, p. 301 where the words of the Statute of Westminster, 3 Edw. 1, c. 34 (1275).

are set out as follows :—

" Forasmuch as there have been oftentimes found in the country (devisers) of tales whereby discord or occasion of discord has many times arisen between the King and his people or great men of this realm, for the damage that hath and may therefore ensue, it is commanded that from henceforth none be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale."

(c) It also appears that the author of a " tale " was punishable by indictment.

See notes to the case of *The King* v. *Hoaglin*, 12 Criminal Cases, at p. 229.

" This statute proceeds on the idea, that, by the common law, as well understood at the time, and enforced by the Courts, the author of the tale was punishable by indictment—as undoubtedly was the propagator of it also—and the statute merely provided a means by which he should be effectually discovered and brought to justice. Bishop on Criminal Law, 5th Ed., (1872) par. 473."

The notes to the case of—

The King v. *Hoaglin*, 12 Criminal Cases, p. 226 at p. 230 refer to the conviction of Alexander Scott at the Old Bailey for publishing false news, the Defendant being a billsticker, and having posted a bill to the effect that war with France would be proclaimed on a certain day. He was acquitted, it being shown that he had been imposed upon, and induced to stick up the bills containing the false matter believing it to be true, whereas it was a forgery. The note states :—

" There does not seem to have been any doubt that the act with which he was charged was indictable. Scott's Case, 5 New Newgate Calendar, p. 284."

(d) The fact that these acts had been crimes before Confederation is relied on to support the contention that they and the kindred infractions dealt with by the Press Bill fall within the subject matter of the " criminal law " under Section 91, subsection 27.

See report of the argument before the Judicial Committee in—
Attorney-General for Ontario v. *Hamilton Street Railway* (1903) A.C. p. 524; 72 L.J.P.C., p. 105

as reported in—

Lefroy's " Canada's Federal System," p. 324 :—

" Lord Davey is reported to have said to counsel for the province : ' Your difficulty is that at the time of Confederation this (*i.e.*, the

infraction of the provisions of the Lord's Day Act) was already a crime. It is not as if they had passed an Act for the first time for dealing with a matter that was within their jurisdiction, and imposed the penalty for the purpose of enforcing an Act of that character. That is not the case. It was already a crime at the time of Confederation. And, therefore, this subject, which is already a crime, was outside their jurisdiction to deal with. If they were dealing with this for the first time, I could follow the argument.' "

5. The Parliament of Canada has, by appropriate sections of the Criminal Code, expressly treated subjects of a nature similar to those dealt with in the Press Bill as criminal matters :—

(i) Seditious libel is expressly dealt with in the Code.

See Criminal Code, Chapter 36, *R.S.C.* 1927.

Seditious Offences—Sections 130–136.

The speaking of seditious words or the publishing of seditious libel :—

" 133. Seditious words are words expressive of a seditious intention.

2. A seditious libel is a libel expressive of a seditious intention.

3. A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention. R.S., c. 146, s. 132.

134. Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy. 1930, c. 11, s. 3."

A significant amendment to the Code was made in 1930 by inserting the following new Section :—

" 133A. No one shall be deemed to have a seditious intention only because he intends in good faith—

(*a*) to show that His Majesty has been misled or mistaken in his measures; or,

(*b*) to point out errors or defects *in the government* or constitution of the United Kingdom, or of any part of it, or of Canada *or any province thereof*, or in either House of Parliament of the United Kingdom or of Canada, *or in any legislature*, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or

(*c*) *to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.*"

It is submitted that this action of the Dominion Parliament unmistakeably indicates that criticism of Government policy was still regarded as the subject of criminal law and this is emphasized by the fact that the Criminal Code of the Dominion was regarded as the appropriate statute in which to insert ameliorating provisions.

In effect, the Legislature of Alberta by the Press Bill has attempted to amend the Criminal Code by negativing the effect of Section 133A so far as it applies to the Province of Alberta, and to punish by fine and confiscation, in Alberta, acts which are now without penal consequences in the rest of Canada.

(ii) Spreading false news is also dealt with by the Criminal Code (Section 136-R.S.C. 1927, C. 36) :—

> " Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest. R.S., c.146, S. 136."

The Press Bill sections 6 and 7 (Case p. 17, ll. 19 to p. 18, l. 5) purports, in effect, to supplement the penalties prescribed by the Criminal Code by adding to the one year's imprisonment for the publication of false news further penalties, applicable only to newspapers published in Alberta, at the instigation of the Chairman of the Social Credit Board. These additional penalties include :—

(1) Confiscation of property by forcing the free publication of Government statements;

(2) Prohibition of publication of the newspaper;

(3) Prohibition of publication of articles from named sources or writers;

(4) A fine of $500 and possibly a further $1,000 under the Summary Convictions Act, which carries imprisonment in default of payment (Case p. 17, ll. 19 to p. 18, l. 5).

Regarding the severity of these penalties, it should be noted that they are nothing less than confiscatory in their nature. The Bill is wide enough to permit the complete banning of publication, the banning of all writers, and the banning of all sources. In the case particularly of the weeklies and smaller papers, the banning of news or articles from one individual might be quite sufficient to paralyze publication. As can be well assumed, these are often practically one-man papers so far as news-gathering and editorial articles are concerned.

6. Penalties for non-disclosure of writers and sources were also in the realm of criminal law.

Section 4 (Case p. 17, l. 4) requires disclosure of names and authors on the demand of the Chairman of the Social Credit Board.

(i) While this Section is not in its terms limited, as is Section 3, to items regarding Government activity and policy, it is, it is submitted, to be read as ancillary to the public purposes of the Act appearing in the preamble (Case p. 15, l. 21) and in Section 3 (Case p. 16, l. 9).

(ii) But whether Section 4 (Case p. 17, l. 3) applies to all items or only those affecting Government policy is, it is submitted, immaterial;

the matter of disclosure of authors and sources of information is regarded at law as relating to public morals and public policy rather than private rights.

The Statute of 3 Edw. I, Chap. 34 cited above (ante p. 29, l. 2) specifically prohibited the citing or publishing of any false news, etc., and—

" he that doth so shall be taken and kept in prison until he hath brought him into the Court which was the first author of the tale."

This clearly contemplated imprisonment to compel disclosure.

The rigours of the rule requiring disclosure were later modified and an exception was made rendering newspapers immune from the liability to disclose the name of their informant or correspondent. This exception was founded, not upon the private rights of authors or newspapers, but upon considerations of public policy.

See—

Hays v. *Weiland*, 42 O.L.R., p. 637, per Hodgins, C.J., delivering the judgment of the Ontario Court of Appeal, at p. 642;

" The exception itself is founded upon considerations of policy —for, if a newspaper proprietor were compelled to give up the name of his informant, the collection of news would be difficult; and, in the second place, if fair comment and ample apology are a defence to a newspaper, it would be difficult to deny them to the real author of the words complained of."

And see—

Hope v. *Brash*, L.R. 1897, 2 Q.B., at p. 191; 66 L.J.Q.B., p. 653 per Lord Esher, M.R.

7. To sum up the foregoing submissions on this point, the whole genus of the Press Bill is concerned with subjects which were matters of criminal law before Confederation and which have been recognized by Parliament as criminal matters and have been expressly dealt with by the Criminal Code. The Alberta Legislature by the Press Bill is, in effect, attempting to amend the cognate provisions of the Code in their application to Alberta newspapers.

D

The Press Bill is *ultra vires* insofar as it relates to newspapers owned and operated by Dominion companies with other than Provincial objects

1. Section 92, subsection 11, places within Provincial legislative jurisdiction " the incorporation of companies with Provincial objects."

It has already been held in the case of—

Citizens Insurance Company v. *Parsons*, 7 A.C., 96, 51 L.J., P.C. 11

that—

> " . . . it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power (*i.e.*, peace, order, and good government). The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces, and the only subject on this head assigned to the Provincial Legislature being ' The incorporation of companies other than Provincial falls within the general powers of the Parliament of Canada '."

It was held in—

John Deere Plow Company v. *Wharton* (1915) A.C. 330; 84 L.J., P.C., p. 64 at p. 72 that—

> " The status and powers of a Dominion Company as such cannot be destroyed by a Provincial legislature."

and in—

Great West Saddlery Company Limited v. *The King* (1921) 2 A.C. 91; 90 L.J.P.C., p. 102.

that the imposition on a Dominion company of a penalty for carrying on business while unregistered was to make it impossible for the Company to enter into or enforce its ordinary business engagements and contracts until registration was effected and so to destroy, for the time being, the status and powers conferred upon it by the Dominion, and that this was therefore *ultra vires* the Provincial Legislature.

In the case of—

Attorney-General for Manitoba v. *Attorney-General for Canada* (1929) A.C. 260; 98 L.J.P.C., p. 65 at p. 69.

Viscount Sumner, in delivering the Judgment of the Privy Council, said—

> " As a matter of construction, it is now well settled that in the case of a company incorporated by Dominion authority with power to carry on its affairs in the Provinces generally, it is not competent to the legislature of those Provinces so to legislate as to impair the status and essential capacities of the Company in a substantial degree."

A case even stronger in favour of the paramount power of the Dominion Government was—

St. Francis Hydro Electric v. *Continental Heat & Light Company* (1909) A.C. 194; 78 L.J.P.C., p. 61.

In this case the Provincial Company was entitled, by the terms of its charter, to exclusive operation of electricity within a prescribed area. The Dominion Company invaded this exclusive territory and it was held that the Dominion Company was empowered so to do.

It is true that the absolute effect of these cases has been to some extent modified by the case of—

Attorney-General of Quebec v. *Attorney-General of Canada* (*re Insurance Act of Canada*) (1932) A.C. 41, 101 L.J.P.C. 26

in which the following passage occurs confirming previous decisions to the effect that—

> " it is within the power of the Dominion Legislature to create the person of a Company and endow it with powers to carry on a certain class of business, to wit insurance; and nothing that the Provinces can do by legislation can interfere with the status so created, but nonetheless, the Provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces."

and in the case of—

Mayland and Mercury Oils Limited v. *Lymburn et al* (1932) A.C. 318, 101 L.J., P.C. 89 at p. 92

it was held that—

> " there appears no reason why it (*i.e.*, a Dominion Company) should not be subject to the competent laws of the Province as to the business of all persons who trade in securities. As to the issue of capital there is no complete prohibition as in the Manitoba Case in 1929, and no reason to suppose that any honest company would have any difficulty in finding registered persons in the Province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilized or its status and essential capacities impaired in a substantial degree."

In the case of—

Rex v. *Hazzard* (1932) 1 D.L.R. 575 at p. 576

Riddell, J. A., referring to the case of—

Attorney-General of Manitoba v. *Attorney-General of Canada* (1929) (*supra*)

said—

> " The powers of the Dominion and of the Province respectively are so fully and so clearly discussed and stated in this case, that I do not think it necessary to cite others, almost equally well known. In a word, there is nothing in the Act which can ' impair the status and powers ' of the Company and that seems the final and authoritative test."

2. The effect of the Press Bill is, it is submitted, definitely to impair the status and powers of a Dominion company operating a newspaper in Alberta :—

(i) The requirements of Section 4 (Case p. 17, l. 4), that sources of information and names of writers be disclosed would obviously make it

virtually impossible to carry on the business of a newspaper. It was on grounds of public policy that the former rules requiring disclosure were abrogated; see extract from *Hays* v. *Weiland* 42, O.L.R. p. 637, quoted at top of p. 30 (ante).

(ii) Under Section 6 (a) (Case p. 17, l. 23), the publication of a newspaper may be prohibited either for a definite time or until further order.

(iii) Under Section 6 (b) and 6 (c) (Case p. 17, l. 25), the functions and activities of a company will be completely sterilized or its status and essential capacities impaired in a substantial degree, to use the words of the Lordships of the Privy Council in the case of

Mayland and Mercury Oils Limited v. *Lymburn et al* (1932) A.C. 318, 101 L.J., P.C. 89 at p. 92.

Their Lordships held in this case that

> " there appears no reason to suppose that any honest company would have any difficulty in finding registered persons in the Province through whom it could lawfully issue its capital."

thus indicating that one of the tests as to whether the functions of the Company were being sterilized was to ascertain whether the Provincial regulations sought to be imposed could be complied with without undue difficulty.

In this case having regard both to the terms of the Bill itself and to the surrounding circumstances showing the lengths to which the Chairman of the Social Credit Board could go in the exercise of dictatorship, and taking into consideration the extraordinary and arbitrary nature of the legislation of which this Bill is a part, it is submitted that it cannot be said that the Company could without difficulty continue to exercise its functions if compliance with the requirements which might be made is to be a condition precedent thereto. In fact, the provisions of the Bill point inevitably to the paralyzing of the Company, either—

(*a*) By compliance with Section 4, and thus completely drying up sources of information; or

(*b*) By non-compliance, resulting in prohibition of publication.

3. If it is suggested that the provisions of the Bill are severable and could be made to apply to Provincial companies alone the test is—

(1) would the effect be to make a new law? or

(2) Can it be found that clearly the Legislature would have passed the Bill if it were in terms limited in the way in which those who argue for severability would have it construed?

See—U.S. v. *Reese*, 92 *U.S.*, 214

where the Supreme Court of the United States said :—

> " To limit this Statute in the manner now asked would be to make a new law, not to enforce an old one."

See—Warren v. *Charlestown* 2 *Gray* 84

where Shaw, C.J. said—

> " The whole (of the statute) fails where the connection between, and the mutual dependence of, the valid and the invalid as conditions, considerations or compensations for each other are such that the elimination of the bad would leave the good a different law in effect."
>
> *See—the Bootmakers' case in Australia,* 1910 11 *C.L.R.* 1 :

where the test was stated as follows :

> " would the Act with the bad omitted be substantially a different law as to the subject matter dealt with by the part remaining."

The test is put another way by Rowell, C.J.O. in the case of 10

Toronto v. *York Township* (1937), 1 D.L.R. 175 at p. 187.

The learned Chief Justice there said :—

> " we would not be justified in concluding that the legislature would not have passed the Act without the clauses objected to but, on the contrary, I see strong ground for believing that the Legislature would have passed the Act."

Applying these tests to the Press Bill :

> (*a*) If the Bill were limited to newspapers operating under Provincial charters, would that be making a new law ?
>
> (*b*) Would the Legislature have passed the Bill if it were only 20 applicable to Provincial companies ?

It is submitted that it would be making a distinctly new law if the Act were construed to distinguish between newspapers published under Provincial charter and newspapers published under Dominion charter, and that it cannot be said that the Legislature would have passed the Bill if it were only to be applicable to newspapers operating under Provincial charter. Two reasons are—

(1) If this Bill had been limited to newspapers operating under Provincial charter, it would mean that the Legislature would only be driving critics of the Government policy to concentrate their expressions of views in the 30 papers operating under Dominion charter *i.e.*, the stronger and more widely circulated mediums of publicity. It can hardly be assumed that the Legislature would have contemplated legislation to bring about this situation ; and

(2) To apply the drastic and arbitrary provisions of this Bill to papers operating under Provincial charter alone would constitute discrimination of the most onerous sort and would impose an unfair burden on papers operating under Provincial charter. This it cannot be assumed would be contemplated by the Provincial Legislature.

On this last point reference is made to the Australian case of— 40

Kababia v. *Wilson* 11 C.L.R. 689.

There a statute regulating ships was applied to those engaged in trade between " port and port." This was held to be an excessive exercise of

power and could not be construed as being good in the case of ships trading between the States of the Commonwealth because, by such construction, a burden would be placed upon the last mentioned ships while the ships engaged in local trade would go free, and no such differentiation could have been contemplated.

E

THE PROVISIONS OF SECTION 6 ARE ULTRA VIRES AS DELEGATING JUDICIAL FUNCTIONS TO THE LIEUTENANT GOVERNOR-IN-COUNCIL AND THE CHAIRMAN IN CONTRAVENTION OF THE PROVISIONS OF THE B.N.A. ACT—SECTIONS 96, 99 AND 100.

The only reasonable construction which can be given to Section 6 (Case p. 17, l. 19) is that it confers on the Lieutenant Governor-in-Council the power, upon the recommendation of the Chairman, to adjudge whether the proprietor, editor, publisher, or manager of any newspaper has been guilty of contravention of any of the provisions of this Act.

If this is not the interpretation of the Section, then it must mean that it is to be a condition precedent to action by the Lieutenant Governor-in-Council, upon the recommendation of the Chairman, that the proprietor, editor, publisher or manager must have been found guilty in a proceeding under the Summary Convictions Act under Section 7, subsection (3) (Case p. 18, l. 3).

This would involve an attempt by the Legislature to add to the fine of $500 prescribed by Section 7, subsection (1) (Case p. 17, l. 29) a punishment which is not properly included in the words " fine, penalty or imprisonment " as contained in subsection (15) of Section 92 and would, it is submitted, be *ultra vires* the Provincial Legislature.

See *Queen* v. *Justices of Middlesex*, L.R. 9 Q.B.D. 41 and see—
Vestry of Bermondsey v. *Johnson* L.R. 8 C.P. 441.

Taking the meaning to be as first set out, the Lieutenant Governor-in-Council and the Chairman would be required to act as judges and determine the various elements of fact and law involved in the proof of a contravention of the detailed subsections of Section 3 and the intricate provisions of Section 4.

For instance, under Section 3 (1), the statement which the Chairman may require to be published is one which " has for its object " the correction or amplification of any statement relating to any policy or activity of the Government. The Chairman here would be the Judge in his own case as to what in fact the object of the statement was, and the Lieutenant Governor-in-Council would have to adjudge the existence of that object, based on an examination of the statement and consideration of the Chairman's own evidence.

The Lieutenant Governor-in-Council and the Chairman would have to adjudge, under subsection (7) of Section 3 whether or not the statement, the publication of which is required, contained any matter which was

required to be made pursuant to or which was ordinarily published as advertising. This would involve a judicial determination of the requirements of other Statutes and of the facts involved in the question as to whether such matter could be said to be ordinarily published as advertising.

In acting as Judges in respect of alleged contraventions of Section 4, the Lieutenant Governor-in-Council and the Chairman would have to decide whether, as a matter of fact, the return in writing set out *every* source from which any information emanated, and whether the return stated the names, addresses, and occupations of *all* persons by whom the information was furnished to the newspaper.

These judicial functions are of the greatest import because they may result, not only in prohibiting publication or prohibiting publication of articles from named sources or authors, but they may also result in the imposition of two fines—one for $500 and one for $1,000.

Reference is made to the recent decision of the Court of Appeal in Ontario in the case of

Toronto v. *York Township*, 1937, 1 D.L.R. at p. 175

and to the decision of Rowell, C. J. O. and of Riddell, J. A., regarding the principles relevant to attempts by Provincial Legislatures to set up Courts of this kind.

It is respectfully submitted that Question 3 in the Order of Reference should be answered in the negative.

S. B. WOODS
S. W. FIELD
J. L. RALSTON

Counsel for the Parties on whose behalf this Factum is submitted, as named on page 1 hereof.

January 4, 1938.

APPENDIX I

Memorandum Regarding the History of the Law of Seditious or Political Libel as Discussed in Stephen's History of Criminal Law. Vol. 2, pp. 298–380.

P. 300–1 :

> " Under the Plantagenets the law of Libel was comparatively unimportant, though the offence of libel defined in the most general terms as a defamatory writing was known to the law. Under the Tudors and Charles I, the law of libel became highly important and prominent. The definition of the offence was stringent though vague, and the law was administered by the Star Chamber, which decided both the law and the fact. During the latter part of the seventeenth century and into the eighteenth the Court of King's Bench adopted the doctrines of the Court of Star Chamber, but as

the mode of trial was by jury efforts were made by very distinguished advocates—and especially towards the end of the century by Erskine—to get juries to adopt for practical purposes a definition of the offence of libel different from the one acted upon in earlier times. This caused the famous controversy finally ended by Fox's Libel Act, passed in 1792 . . . but the change of public sentiment as to the free discussion of political affairs has practically rendered the law as to political libels unimportant, inasmuch as it has practically restricted prosecutions for libel to cases in which a libel amounts either to a direct incitement to crime, or to false imputations upon an individual, of disgraceful conduct in relation to either public or private affairs."

The above paragraph refers of course to the general law of libel, but it will be seen that the law of seditious libel as presently laid down in our Criminal Code grew out of the administration of the general law of libel, and especially of the law of political libel as hereinafter explained.

One of the earliest statutes, however, on the subject analagous to libel is the *Statute of Westminster*, 3 Edw. 1. c. 34 (1275).

It is the precursor of present Sec. 136 of the Criminal Code being the section as to spreading false news hereinbefore referred to (ante p. 31, l. 8).

See notes to the case of :—

The King v. *Hoaglin*, 12 Can, Crim. Cases, 226,

and also—

page 301 of *Stephen's Vol. II.*

where the words of this ancient statute are set out as follows :—

" Forasmuch as there have been oftentimes found in the country (devisers) of tales whereby discord or occasion of discord has many times arisen between the king and his people or great men of this realm, for the damage that hath and may therefore ensue, it is commanded that from henceforth none be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm ; and he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale."

It is stated in the notes to the *Hoaglin* case that the author of a tale was punishable by indictment at the common law and the statute merely provided a means by which he should be effectually discovered and brought to justice.

The *Hoaglin* case was a case in Alberta in 1907 before Harvey, J. (now C.J.) where the accused was tried for publishing a circular in which it was stated that Americans were not wanted in Canada, and advising them to investigate before buying land or taking homesteads in the country. The accused was convicted under Sec. 136 of the Criminal Code for spreading false news against the public interest.

This is apparently the only known case on that section, and it is remarked by Harvey, J. that the charge is a very uncommon one but that apparently it was thought advisable to keep the offence covered by the criminal law of the country as incorporated in the Code.

P. 302–3 :

> " But apart from this the great subjects of discussion in all ages are religion and politics . . . Under Henry VIII, Edward VI, Mary and Elizabeth, any discussion in a sense hostile to the government for the time being of political questions of real importance would be likely to bring the disputant within one of the many statutes by which new treasons and felonies were from time to time created."

P. 305–6 :

Reference is here made to Hudson's treatise on the Star Chamber and a quotation is given at these pages showing that in the time of Elizabeth when Sir Edward Coke was Attorney General, libels were severely punished, but that libels which touched the alteration of the government appear to have been dealt with under special acts as treason or felony. Also that libel as administered by the Court of Star Chamber was by no means confined to libels against the King's person and nobles, but included scandalous letters from person to person.

P. 308 :

An account is here given of *Pine's* case, who spoke disrespectfully of Charles I, and of the resolution of fourteen judges thereon, certified to His Majesty, to the effect that the speaking of the words was not treason, Stephen says,

> " They (referring to the words of disrespect of the King) would have been punishable at that time not only in the Star Chamber, but as a contempt against the King at common law."

P. 309 :

and some following pages give an account of the law relating to the licensing of books in which it is made clear that after printing became general in England after the middle of the sixteenth century, the printing of books was under Royal license, chiefly to guard against the publication of books and pamphlets contrary to the particular religion of the sovereign.

At the bottom of P. 310 it is stated as follows :

> " Abundant proof, however, remains that in the reigns of Charles II, and James II, the prosecutions for libel were at once common and highly important, and the punishments cruelly severe."

P. 313-14 :

An account is here given of a trial of Sir Samuel Barnardiston tried for seditious libel apparently about the year 1684. The account of the trial will be found in 3 *State Trials,* 1300. The accused apparently had

written four private letters to a personal friend, Sir Philip Skippon, expressing opinions with regard to the politics of the day and repeating various rumours then current to the effect that a turn in affairs favourable to the Whigs had taken place. The Trial Judge was apparently the notorious Jeffreys. Stephen says :

> " Finally the defendant was sentenced to pay the monstrous fine of £10,000 for the mere expression of political opinions to a private friend in a private letter."

P. 315 :

Reference is here made to the trial of the seven bishops for libel in 1688, reported in 11 *State Trials*, 1339, which of course was a case of political libel.

P. 317-18 :

At these pages is an account of the conviction of one Tutchin in 1704, who was convicted of libel for articles in a periodical called the Observator,

> " Which (says Stephen) in these days would be described as opposition articles. They said, in substance, that the ministry was corrupt and the navy ill-managed. Lord Holt was the presiding Judge. The fair way of describing his charge seems to me to be that it shows that the question how far the jury were to judge of the character of a libel, and how far it was a question of law for the court, had not at that time been fully raised or appreciated."

The interest, however, in Lord Holt's charge to the Jury in connection with the present discussion is found in that portion of it in which he says as follows :

> " *And nothing can be worse to any government than to endeavour to produce animosities as to the management of it ; this has always been looked upon as a crime and no government can be safe without it is punished.*"

Another illustration will be found at

P. 321-22 :

of the trial of one Francklin for publishing a periodical called the " Craftsman," which is described by Lord Mansfield in his judgment in the Dean of St. Asaph's case (see p. 316) as being a celebrated party paper written in opposition to the party of Sir Robert Walpole.

P. 321 :

> " The Craftsman censured the foreign policy of the then government in reference to a treaty concluded with Spain, and charged them in language by no means violent with incapacity and bad faith."

Francklin was convicted.

In the following pages up to p. 343 the author gives the history, taken chiefly from Lord Mansfield's judgment in the case above mentioned, of

the controversy which led to the passing of Fox's Libel Act, which left the question of libel or no libel exclusively to the jury, whereas prior to this the only question the jury was asked to consider was whether there had been publication of the suggested libel and as to the truth of the innuendo as laid in the indictment, it being left to the Court to decide whether the matter of the alleged libel constituted a libel or not.

P. 343-4 :

At these pages the question left to the Judges as to the existing state of the law by the House of Lords at the time when Fox's Libel Act was before it are set out, and it is clear from these questions that the whole matter was treated as being a criminal matter. The proposition contained in the answers to these questions shows this quite clearly. The first of these propositions is that

> " the criminality or innocence of any act done (which includes any paper written) is the result of the judgment which the law pronounces upon that Act, and must therefore be in all cases, and under all circumstances, matter of law and not matter of fact, and this as well where evidence is given for the defendant as where it is not given."

Then the fourth proposition as the result of the answers is as follows :

> " The criminal intention charged upon the defendant in legal proceedings upon libel is generally matter of form, requiring no proof on the part of the prosecutor and admitting of no proof on the part of the defendant to rebut it. The crime consists in publishing a libel. A criminal intention in the writer is no part of the definition of libel at the common law. ' He who scattereth firebrands, arrows, and Death ', which if not a definition, is a very intelligible description of a libel, is *ea ratione* criminal ; it is not incumbent on the prosecutor to prove his intent, and on his part he shall not be heard to say, ' Am I not in sport ? ' "

then after dealing with the history of the matter up to that time Stephen says,

P. 347 :

> " This celebrated act, and the discussions which led to it, are perhaps the most interesting and characteristic passage in the whole history of the criminal law."

P. 348 :

At this page the author gives a definition of seditious libel as the same was understood in the latter part of the eighteenth century as follows :

> " The first question to be considered is, what in the latter part of the eighteenth century was the proper definition of a seditious

libel? Omitting technicalities, I think it might at that time have been correctly defined as *written censure upon public men for their conduct as such, or upon the laws, or upon the institutions of the country.* This is the substance of Coke's case, ' De Libellis famosis,' which is the nearest approach to a definition of the crime with which I am acquainted. It was a definition on which the Star Chamber acted invariably, and which was adopted after the Restoration by the Court of King's Bench. It is in harmony with the whole spirit of the period in which it originated, and in particular with the law as to the licensing of books and other publications which then and afterwards prevailed. It was in substance recognized and repeated far into the eighteenth century and was never altered by any decision of the Courts or any Act of Parliament."

He goes on as follows :

" That the practical enforcement of this doctrine was wholly inconsistent with any serious public discussion of political affairs is obvious, and so long as it was recognized as the law of the land all such discussion existed only on sufferance."

He is here of course referring to the fact that at that time strictly speaking a seditious libel was any " written censure upon public men for their conduct as such or upon the laws or upon the constitutions of the country."

P. 355 :

At this page is a remark in connection with the case of Woodfall tried before Lord Mansfield of

" the possibility that there might be such a thing as excuse or justification for the publication of a libel "

which is said by the author to have been admitted by Lord Mansfield in this case and which was made great use of by Erskine in his subsequent arguments.

P. 359 :

The author states here that :

" The Libel Act (Fox's Libel Act) must thus be regarded as having enlarged the old definition of a seditious libel by the addition of a reference to the specific intentions of the libeller—to the purpose for which he wrote. And a seditious libel might since the passing of that Act, be defined (in general terms) as blame of public men, laws or institutions, published with an illegal intention on the part of the publisher. This was in practice an improvement upon the old law, which indeed was, as I have already pointed out, altogether inconsistent with serious political discussion. The alteration was skilfully made, and the legal reasons assigned for it were plausible, though I think they were nothing more. It is highly improbable

that an attempt to give an express statutory definition of the crime would have produced anything better than the practical result of the Libel Act."

It is submitted that it will thus be seen that it was a result of the passing of the Libel Act that the law was changed in the sense now found in our Criminal Code at Sec. 133 (A), and this is further borne out by the summing up of Lord Ellenborough in the case of Lambert and Perry in 1810, the proprietors of the *Morning Chronicle* who were prosecuted for seditious libel, this summing up being referred to at

P. 368 : 10

On this page there is set out the seditious libel in respect of which Lambert and Perry were charged. It will be seen to have been merely a criticism of the government and the effect of what Lord Ellenborough said is

> " that moral blame must not be imputed to the King (the case of his deserving it is not suggested or considered), but that it is not libellous to suggest that his measures are mistaken. This is stated at considerable length, but with vigour and clearness, and the principle is applied with conspicuous fairness to the case under consideration. I am not prepared to mention any case before this 20 in which a judge of such high authority as Lord Ellenborough had distinctly said that it was no libel to say that a King was mistaken in the whole course of his policy. . . . In the troubled times which followed the peace of 1815 there were many prosecutions for political libels, and the offence of seditious libel received for the first time a kind of statutory definition."

The author sets out in part the terms of a statute passed in 1819 which gives the following definition of a seditious libel :

> Any seditious libel tending to bring into hatred or contempt the person of his Majesty, his heirs or successors, or the regent, or 30 the government and constitution of the United Kingdom as by law established or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established otherwise than by lawful means."

The following submissions are based on the foregoing historical survey of the crime of Seditious or Political Libel :—

> (1) That from the time of the Tudors down to the beginning of the 19th century written or published criticism of the government was a crime involving severe penalties and punishable as such.
>
> (2) That it was not until after the passing of Fox's Libel Act in 40 1792 that the consideration now found in our Criminal Code at Sec. 133 (A) that it is not seditious to point out errors and defects in the government and to urge their removal by lawful means, was

admitted as a valid defence in a trial for libel. The earliest instance of this is found in Lord Ellenborough's charge to the jury in the Lambert and Perry case in 1810.

(3) That prior to the Libel Act the theory of the law was that set out by Lord Holt in the Tutchin case in 1710; and that as stated by him " possessing the people of an ill opinion of the government . . . has always been looked upon as a crime."

(4) That it is this old theory of the crime of seditious libel that is embodied in the Press Bill presently being discussed.

IN THE SUPREME COURT OF CANADA.

IN THE MATTER OF—Three Bills passed by the Legislative Assembly of the Province of Alberta at the 1937 (Third Session) thereof, entitled respectively :

"An Act Respecting the Taxation of Banks";

"An Act to Amend and Consolidate the Credit of Alberta Regulation Act"; and

"An Act to Ensure the Publication of Accurate News and Information";

and reserved by the Lieutenant-Governor for the signification of the Governor-General's pleasure.

FACTUM OF THE ALBERTA PRESS.

Filed on behalf of :

NORTHWESTERN PUBLISHERS LIMITED (Edmonton Journal);

SOUTHWESTERN PUBLISHERS LIMITED (Calgary Herald);

LETHBRIDGE HERALD COMPANY LTD. (Lethbridge Herald);

ALBERTA FREE PRESS LIMITED (Edmonton Bulletin);

ALBERTAN PUBLISHERS LTD. (Calgary Albertan);

MEDICINE HAT NEWS LTD. (Medicine Hat News);

and

THE ALBERTA DIVISION, CANADIAN WEEKLY NEWSPAPERS ASSOCIATION.

(Comprising eighty Weekly Newspapers).