1960

*May 16, 17
Oct. 4

JAMES PATRICK O'GRADY .....APPELLANT;

AND

HARVEY D. SPARLING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Criminal law—Whether provincial careless driving enactment intra vires—Advertent and inadvertent negligence—The Highway Traffic Act, R.S.M. 1954, c. 112, s. 55(1)—Criminal Code, 1953-54 (Can.), c. 51, ss. 191(1), 221(1).

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] [1941] S.C.R. 396 at 403, 3 D.L.R. 305.

The accused being charged under s. 55(1) of the Manitoba *Highway Traffic Act* with driving without due care and attention moved for an order of prohibition on the ground that s. 55(1) was *ultra vires* because it was legislation in relation to criminal law, and also, because the subject-matter of the section fell within the paramount jurisdiction of Parliament, which had occupied the field by the enactment of s. 221 of the *Criminal Code*. The motion was dismissed at trial, and this dismissal was affirmed on appeal. Pursuant to the granting of special leave the accused appealed to this Court.

Held (Locke and Cartwright JJ. *dissenting*): The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: A provincial enactment does not become a matter of criminal law merely because it consists of a prohibition and makes it an offence for failure to observe the prohibition. Section 55(1) of *The Highway Traffic Act* has for its true object, purpose, nature or character the regulation of traffic on highways and is valid provincial legislation.

There is no conflict or repugnancy between this section and s. 221 of the *Criminal Code*. The provisions of the two sections deal with different subject-matters and are for different purposes; s. 55(1) is highway legislation dealing with regulation and control of traffic on highways, and s. 221 is criminal law dealing with "advertent negligence". Even though a particular case may be within both provisions that does not mean that there is conflict so as to render s. 55(1) suspended or inoperative.

Parliament has defined "advertent negligence" as a crime under ss. 191(1) and 221(1) of the Code. It has not touched "inadvertent negligence", which is dealt with under the provincial legislation in relation to the regulation of highway traffic.

Regina v. Yolles, [1959] O.R. 206, approved; *Lord's Day Alliance of Canada v. Atty.-Gen. of British Columbia et al.*, [1959] S.C.R. 497, applied; *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576; *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396; *Quong-Wing v. The King*, (1914) 49 S.C.R. 440; *McColl v. Canadian Pacific Railway Co.*, [1923] A.C. 126; *R. v. Corry* 26 Alta. L.R. 390; *R. v. Dodd*, [1957] O.R. 5, *R. v. Mankow*, (1959) 28 W.W.R. 433; *R. v. Stephens*, (1959-60) 30 W.W.R. 145, referred to.

Per Locke and Cartwright JJ., *dissenting*: While the types of negligence dealt with in the two enactments differ, the true nature and character of the legislation contained in s. 55(1) of the Act does not differ in kind from the legislation contained in ss. 191(1) and 221(1) of the Code. Each enactment makes negligence a crime although one deals with inadvertent negligence and the other with advertent negligence. The provisions of s. 55(1), if enacted by Parliament as part of the *Criminal Code*, would clearly be a law in relation to the criminal law within the meaning of head 27 of s. 91 of the *British North America Act*. The impugned sub-section differs generically from those provisions of the Act prescribing detailed rules of conduct.

There is no room for the view that s. 55(1) is *intra vires* because it operates in an otherwise unoccupied field, for the field which the impugned legislation seeks to enter is one reserved exclusively for Parliament by head 27 of s. 91.

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Assuming that s. 55(1) has a provincial aspect, which in fact it does not have, the view that it would be valid under the "overlapping doctrine" until Parliament occupies the field in which it operates cannot be accepted, for Parliament has by necessary implication fully occupied the field. Parliament has expressed that a certain kind or degree of negligence shall be punishable as a crime, and it follows that it has decided that no less culpable kind or degree of negligence shall be so punishable. The provincial legislature cannot remedy what it regards as defects or omissions in the criminal law as enacted by Parliament.

Regina v. Yolles, supra; Provincial Secretary of P.E.I. v. Egan, supra, discussed; *Attorney-General for Ontario v. Winner,* [1954] A.C. 541; *Proprietary Articles Trade Association v. Attorney General for Canada,* [1931] A.C. 310; *Union Colliery Co. of British Columbia v. Bryden* [1899] A.C. 580; *Toronto R. Co. v. The King,* [1917] A.C. 630, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from the judgment of Williams C.J.K.B. Appeal dismissed, Locke and Cartwright JJ. dissenting.

H. P. Blackwood, Q.C., and *S. Paikin, Q.C.,* for the appellant.

G. E. Pilkey, for the respondent.

W. R. Jackett, Q.C., and *S. Samuels,* for the Attorney General of Canada.

W. J. Wilson, Q.C., for the Attorney General for Alberta.

L. H. McDonald, for the Attorney General for Saskatchewan.

W. G. Burke-Robertson, Q.C., for the Attorney-General of British Columbia.

E. Pepper, for the Attorney-General for Ontario.

The judgment of Kerwin C. J. and of Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant, being charged under s. 55(1) of the Manitoba *Highway Traffic Act* with driving without due care and attention, moved for prohibition on the ground that the section was beyond the powers of the provincial legislature because it was legislation in relation to criminal law, and also, because the subject-matter of the section fell

[1] (1959-60), 30 W.W.R. 156, 22 D.L.R. (2d) 150.

within the paramount jurisdiction of the Parliament of Canada, which had occupied the field by the enactment of s. 221 of the *Criminal Code*.

The motion for prohibition was dismissed by the Chief Justice of the Court of Queen's Bench, who adopted the reasoning of the majority of the Ontario Court of Appeal in *Regina v. Yolles*[1]. This dismissal was affirmed on appeal[2], Adamson C.J.M. dissenting. The appellant now appeals pursuant to special leave granted by this Court.

Section 55(1) of *The Highway Traffic Act*, R.S.M. 1954, c. 112, reads:

> Every person who drives a motor vehicle or a trolley bus on a highway without due care and attention or without reasonable consideration for other persons using the highway is guilty of an offence.

The relevant sections of the *Criminal Code* are ss. 191(1) and 221(1), as follows:

> 191(1) Everyone is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> 221(1) Everyone who is criminally negligent in the operation of a motor vehicle is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for five years, or
>
> (*b*) an offence punishable on summary conviction.

It is at once apparent that the problem is precisely the same as the one under consideration in *Regina v. Yolles*[3]. In the first instance, in *Regina v. Yolles* the corresponding Ontario legislation was held to be *ultra vires*. The Court of Appeal, by a majority judgment, held that it was valid provincial legislation in relation to the administration and control of traffic upon highways within the province and not legislation in relation to criminal law, and further, that it was not repugnant to, nor in conflict with s. 221(1) of the *Criminal Code*.

The central point of this appeal is the appellant's submission that whenever Parliament chooses to attach penal consequences to negligence of whatever degree, then any

[1] [1959] O.R. 206, 19 D.L.R. (2d) 19.
[2] (1959-60), 30 W.W.R. 156, 22 D.L.R. (2d) 150.
[3] [1958] O.R. 786, reversed [1959] O.R. 206.

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provincial legislation relating to negligence with penal consequences attached to it must be legislation in relation to criminal law. This submission assumes a complete identity of subject-matter which in my opinion does not exist. It is also founded, in part at least, upon a theory of the existence of a "general area" or "domain" of criminal law which has been considered and rejected by this Court.

There is a fundamental difference between the subject-matter of these two pieces of legislation which the appellant's argument does not recognize. It is a difference in kind and not merely one of degree. This difference has been recognized and emphasized in the recent writings of Glanville Williams on Criminal Law, para. 28, p. 82, and by J. W. C. Turner in the 17th edition of Kenny's Outlines of Criminal Law. I adopt as part of my reasons Turner's statement of the difference to be found at p. 34 of Kenny:

> But it should now be recognized that at common law there is no *criminal* liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute *mens rea*, and they are intention and *recklessness*. The difference between recklessness and negligence is the difference between advertence and inadvertence; they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word "negligence" with some moral epithet such as "wicked", "gross", or "culpable" has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression to explain itself.

The appellant argues that negligence of any degree may form the essential element of a criminal offence. As an abstract proposition I would not question this provided the criminal offence, in a federal state, is defined by the proper legislative authority. But it does not follow that the provincial legislature, in dealing with this subject-matter in the exercise of its regulatory power over highway traffic, is enacting criminal law.

The appellant says that the history of the common law shows that inadvertent negligence was sufficient to support a charge of manslaughter and that consequently, when penal consequences are attached to inadvertent negligence under

a provincial highway code, the legislation is necessarily in relation to criminal law. This is the proposition stated by McRuer C.J.H.C. in the *Yolles* case[1] in these terms:

> What the provincial legislature has done is to attempt to revive the old common law offence of causing death by mere negligence by extending it to all cases of careless driving of vehicles on a highway, whether death ensues or not.

I doubt whether the existence of such a common law offence can be deduced from the dicta of early 19th century judges sitting at *nisi prius,* as found in the scanty reports of the time. The question must have been what was meant and what meaning was conveyed by the trial judge when he used an elastic word such as "negligence" in relation to the facts of the case. Most of the cases quoted by McRuer C.J.H.C. are collected in 9 Hals., 1st ed., p. 582, note (l) where they are referred to as cases of manslaughter owing to negligent driving and riding. In the second edition, 9 Hals., 2nd ed., p. 441, note (m), they are referred to as illustrations of manslaughter by reason of "gross" negligence in driving, riding or navigation, and in the third edition, as illustrations of manslaughter occasioned by "criminal" negligence (10 Hals., 3rd ed., 717, note (h)).

I think that the same doubt is expressed in *Andrews v. Director of Public Prosecutions*[2]. In any event, there is no such common law offence now in England and it is not to be found in the criminal law of Canada. The *Criminal Code* confines its definition of crime in ss. 191(1) and 221(1) to a certain kind of conduct. This is not the kind of conduct referred to in the provincial legislation, nor is the provincial legislation dealing with another degree of the same kind of conduct aimed at by the *Criminal Code.*

What the Parliament of Canada has done is to define "advertent negligence" as a crime under ss. 191(1) and 221(1). It has not touched "inadvertent negligence". Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as "crime", it is not crime.

[1] [1958] O.R. 786 at 808.
[2] [1937] A.C. 576 at 581, 106 L.J.K.B. 370.

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The power of a provincial legislature to enact legislation for the regulation of highway traffic is undoubted. (*Provincial Secretary of the Province of Prince Edward Island v. Egan*[1]). The legislation under attack here is part and parcel of this regulation. Rules of conduct on highways have been established by similar legislation in every province and the careless driving section is no different in character from the specific rules of the road that are laid down.

Much of the argument addressed to us was that there was something about the subject-matter of this legislation, careless driving on highways, which made it inherently criminal law. I do not understand this argument in relation to the subject-matter of negligence on highways. What meaning can one attach to such phrases as "area of criminal law" or "domain of criminal law" in relation to such a subject-matter? A provincial enactment does not become a matter of criminal law merely because it consists of a prohibition and makes it an offence for failure to observe the prohibition; (*Quong-Wing v. The King*[2]). On this subject-matter there can be no such area defined either by the common law or by the statutory treatment of the subject in the United Kingdom and in Canada. In mentioning statute law, I have in mind 1938, c. 44, s. 16, *Statutes of Canada,* which did introduce into the *Criminal Code* as s. 285(6) something resembling the provincial legislation in question here, but it is not now in the *Criminal Code.*

The only approach to the problem, it seems to me, is that stated in the *Lord's Day Alliance* case[3].

> In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at. (per Kerwin C.J. at p. 503)

Rand J., at p. 508, stated:

> Into this branch of his argument Mr. Brewin injected the idea of a "domain" of criminal law which, as I understood it, was in some manner a defined area existing apart from the actual body of offences at a particular moment; and that it was characterized by certain distinguishing qualities. Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, enacted to serve what is considered a public interest or to interdict what is deemed

[1] [1941] S.C.R. 396, 3 D.L.R. 305.
[2] (1914), 49 S.C.R. 440, 18 D.L.R. 121.
[3] [1959] S.C.R. 497, 19 D.L.R. (2d) 97.

a public harm or evil. In a unitary state the expression would seem appropriate to most if not all such prohibitions; but in a federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment. This is exemplified in *Attorney General for Quebec v. Canadian Federation of Agriculture* [1951] A.C. 179, [1950] 4 D.L.R. 689, in which certain prohibitions with penalties enacted by Parliament against certain trade in margarine were held to be *ultra vires* as not being within criminal law.

Beyond or apart from such broad characteristics, of no practical significance here, which describe an area by specifying certain elements inhering in criminal law enactments, no such "domain" is recognized by our law. The language of Lord Blanesburgh in the *Manitoba* case refers to "domain" as the body of present prohibitions, the existing criminal law, and nothing else. The same view expressed in *Proprietary Articles Trade Asociation v. Attorney General for Canada* [1931] A.C. 310 at 324; 55 C.C.C. 241; 2 D.L.R. 1; 1 W.W.R. 552, by Lord Atkin will bear repeating: (per Rand J. at p. 508.)

My conclusion is that s. 55(1) of the Manitoba *Highway Traffic Act* has for its true object, purpose, nature or character the regulation and control of traffic on highways and that, therefore, it is valid provincial legislation.

Nor do I think that it can be said to be inoperative because it is in conflict with s. 221 of the *Criminal Code*. There is no conflict between these provisions in the sense that they are repugnant. The provisions deal with different subject-matters and are for different purposes. Section 55(1) is highway legislation dealing with regulation and control of traffic on highways, and s. 221 is criminal law dealing with negligence of the character defined in the section. Even though the circumstances of a particular case may be within the scope of both provisions (and in that sense there may be an overlapping) that does not mean that there is conflict so that the Court must conclude that the provincial enactment is suspended or inoperative; *McColl v. Canadian Pacific Railway Company*[1], *per* Duff J. There is no conflict or repugnancy between s. 55(1) of the Manitoba *Highway Traffic Act* and s. 221 of the *Criminal Code*. Both provisions can live together and operate concurrently.

The problem here seems to me to be the same in principle as that raised by the side-by-side existence of provincial legislation dealing with the duty to remain at or return to the scene of an accident for certain defined purposes, and s. 221(2) of the *Criminal Code* dealing with

[1] [1923] A.C. 126 at 134, 135.

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failure to stop at the scene of an accident "with intent to escape civil or criminal liability". The supposed conflict between these two pieces of legislation has been considered in three provinces. The first decision was *R. v. Corry*[1], which held that the provincial legislation was in relation to the regulation of traffic and not the punishment of crime. In Ontario this decision appears to have been overlooked in *Regina v. Dodd*[2], where it was held that the corresponding Ontario legislation was in conflict with and repugnant to the *Criminal Code*. The *Corry* case has, however, been followed in *R. v. Mankow*[3] and in *R. v. Stephens*[4], both Courts being of the opinion, as I am in the present case, that the two pieces of legislation differed both in legislative purpose and legal and practical effect, the provincial Act imposing a duty to serve bona fide provincial ends not otherwise secured and in no way conflicting with s. 221(2) of the *Criminal Code*.

I would dismiss the appeal. There should be no order as to costs.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to special leave granted by this Court, from a judgment of the Court of Appeal for Manitoba[5] dismissing an appeal from the judgment of Williams C.J.K.B. who had dismissed the appellant's application for an order of prohibition; Adamson C.J.M., dissenting, would have allowed the appeal.

The sole question for decision is whether s. 55(1) of *The Highway Traffic Act*, R.S.M. 1954, c. 112, is *intra vires* of the legislature; it reads:

> 55(1) Every person who drives a motor vehicle or a trolley bus on a highway without due care and attention or without reasonable consideration for other persons using the highway is guilty of an offence.

A penalty for the offence created by s. 55(1) is prescribed by s. 124.

[1] [1932] 1 W.W.R. 414, affirmed [1932] 1 W.W.R. 853, 26 Alta. L.R. 390.
[2] [1957] O.R. 5, 7 D.L.R. (2d) 436.
[3] (1959), 28 W.W.R. 433, 30 C.R. 403.
[4] (1959-60), 30 W.W.R. 145, 32 C.R. 72.
[5] (1959-60), 30 W.W.R. 156, 22 D.L.R. (2d) 150.

The judgment of Williams C.J.K.B. was delivered shortly after that of the Court of Appeal for Ontario in *Regina v. Yolles*[1], in which that Court by a majority consisting of Porter C.J.O., Gibson and Lebel JJ.A. had reversed the answer given by McRuer C.J.H.C. to a question submitted in a stated case holding that s. 29(1) of *The Highway Traffic Act,* R.S.O. 1950, c. 167, as amended, was *ultra vires* of the legislature. Roach and Schroeder JJ.A., dissenting, were of opinion that the subsection was *ultra vires* and would have dismissed the appeal.

Williams C.J.K.B., and Schultz and Tritschler JJ.A. who formed the majority in the Court of Appeal for Manitoba in brief reasons adopted and followed the reasoning of the majority of the Court of Appeal for Ontario in *Yolles'* case, except that Tritschler J.A., who wrote the reasons of the majority, noted his disagreement with the earlier judgment of the Court of Appeal for Ontario in *Regina v. Dodd*[2].

Adamson C.J.M. after examining a number of authorities reached the conclusion that the impugned sub-section was *ultra vires* of the legislature as being in pith and substance criminal law and further that it was *in pari materia* with and in conflict with the Criminal Code; he expressed his agreement with the reasoning of McRuer C.J.H.C. and of Roach and Schroeder JJ.A. in *Yolles'* case.

Section 29(1) of *The Highway Traffic Act* of Ontario which was dealt with in *Yolles'* case reads as follows:

> 29(1) Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and shall be liable to a penalty of not less than $10 and not more than $500 or to imprisonment for a term of not more than three months, and in addition his licence or permit may be suspended for a period of not more than one year.

I agree with Williams C.J.K.B., and indeed it is common ground, that, so far as the question raised on this appeal is concerned, there is no difference in substance between s. 55(1) of the Manitoba Act and s. 29(1) of the Ontario Act; we cannot allow this appeal unless we are prepared to overrule the judgment of the Court of Appeal in *Yolles'* case.

[1] [1959] O.R. 206, 19 D.L.R. (2d) 19.
[2] [1957] O.R. 5, 7 D.L.R. (2d) 436.

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I find the reasons of Adamson C.J.M. in the case at bar and those of Roach J.A. in *Yolles'* case so satisfactory and convincing that I would be content simply to adopt them, but in view of the differences of opinion in the courts of Manitoba and of Ontario and in this Court and in deference to the full and able arguments addressed to us I propose to add some observations of my own.

I trust that it is not an over-simplification to say that the essence of the reasons of the majority in the Court of Appeal in *Yolles'* case may be summarized in the following propositions:

(i) Section 29(1) is legislation in relation to the regulation of highway traffic.

(ii) It has been decided by this Court, notably in *Provincial Secretary of P.E.I. v. Egan*[1] and in *O'Brien v. Allen*[2], that the field of regulation of highway traffic within a province is wholly provincial.

(iii) That consequently s. 29(1) is *prima facie* within the powers of the legislature.

(iv) That s. 29(1) is not in conflict with any existing legislation of Parliament.

It will be convenient to examine first the second of these propositions. The expressions used in the reasons in *Egan's* case, wide though they are, do not assert an unlimited power in the legislatures to control all activities upon the highways. All that the case actually decided was that the legislature had power to require persons driving motor vehicles on highways in the province to obtain a provincial licence and to enact that such licence should be automatically suspended upon the holder being convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs, which was an offence under the *Criminal Code*. The reasons stress the circumstance that the impugned provincial legislation did not create an offence (see pages 415 and 417).

The caution necessary to be observed in applying the *Egan* case in differing circumstances is expressed by Duff C.J. in the following passage at pages 400 and 401:

> A very different question, however, is raised by the contention that the matters legislated upon by the enactments of the Provincial *Highway Traffic Act* in question have, by force of section 285(7) of the *Criminal Code*, been brought exclusively within the scope of the Dominion authority

[1] [1941] S.C.R. 396, 3 D.L.R. 305. [2] (1900), 30 S.C.R. 340.

in relation to criminal law. We are here on rather delicate ground. We have to consider the effect of legislation by the Dominion creating a crime and imposing punishment for it in effecting the suspension of provincial legislative authority in relation to matters *prima facie* within the provincial jurisdiction. I say we are on delicate ground because the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field by reason of the authority of Parliament to create crimes, impose punishment for such crimes, and to deal with criminal procedure. If there is a conflict between Dominion legislation and Provincial legislation, then nobody doubts that the Dominion legislation prevails. But even where there is no actual conflict, the question often arises as to the effect of Dominion legislation in excluding matters from provincial jurisdiction which would otherwise fall within it. I doubt if any test can be stated with accuracy in general terms for the resolution of such questions. It is important to remember that matters which, from one point of view and for one purpose, fall exclusively within the Dominion authority, may, nevertheless, be proper subjects for legislation by the Province from a different point of view, although this is a principle that must be "applied only with great caution". (*Attorney-General for Canada v. Attorney General for Alberta* [1916] 1 A.C. 588 at 596.)

The case of *Attorney General for Ontario v. Winner*[1], involved questions different from those in the case at bar but the following statements in the judgment of their Lordships delivered by Lord Porter make it clear that the provincial power over highways is not unlimited; at page 576:

> Their Lordships are not concerned to dispute either the provincial control of the roads or that it has the right of regulation, but there nevertheless remains the question of the limit of control in any individual instance and the extent of the powers of regulation.
>
> It would not be desirable, nor do their Lordships think that it would be possible, to lay down the precise limits within which the use of provincial highways may be regulated. Such matters as speed, the side of the road upon which to drive, the weight and lights of vehicles are obvious examples, but in the present case their Lordships are not faced with considerations of this kind, nor are they concerned with the further question which was mooted before them, viz., whether a province had it in its power to plough up its roads and so make inter-provincial connections impossible. So isolationalist a policy is indeed unthinkable.

and at page 579:

> Whatever provisions or regulations a province may prescribe with regard to its roads it must not prevent or restrict inter-provincial traffic. As their Lordships have indicated, this does not in any way prevent what is in essence traffic regulation, but the provisions contained in local statutes and regulations must be confined to such matters.

[1] [1954] A.C. 541, 3 All E.R. 177.

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The power of the legislature to make laws in relation to its roads must, of course, be derived from s. 92 of the British North America Act and cannot extend to the making of a law which is in pith and substance in relation to a matter coming within the classes of subjects enumerated in s. 91.

Turning now to the first of the propositions set out above it is necessary to consider what is the true nature and character of the impugned subsection. Is it a law in relation to the regulation of highway traffic, or is it in pith and substance a law in relation to "the criminal law" within the meaning of that phrase as used in head 27 of s. 91 of the British North America Act?

In the course of such an inquiry reference is usually made to the following passage in the judgment of the Judicial Committee delivered by Lord Atkin in *P.A.T.A. v. Attorney General for Canada*[1]:

> "Criminal law" means "the criminal law in its widest sense": *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1903) A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

There is nothing in this passage (which occurs in the course of a judgment rejecting the argument that Parliament can exercise exclusive legislative power under s. 91 (27) only where the subject matter of a questioned enactment "by its very nature belongs to the domain of criminal jurisprudence") to suggest that the Court is unable in the case of a piece of actual or proposed legislation to determine whether or not it is in pith and substance

[1] [1931] A.C. 310 at 324, 100 L.J.P.C. 84.

a law in relation to the criminal law within the meaning of that phrase as used in s. 91(27). That is the very task which the Court is called upon to perform.

In the reasons of my brother Judson, which I have had the advantage of reading, he refers with approval to passages in Glanville Williams on Criminal Law (1953) and in the 17th Edition of Kenny's Outlines of Criminal Law in which the distinction is drawn between "inadvertent negligence" and "advertent negligence". At page 82 of his work Glanville Williams says:

> Responsibility for some crimes may be incurred by the mere neglect to exercise due caution, where the mind is not actively but negatively or passively at fault. This is inadvertent negligence. Since advertent negligence has a special name (recklessness), it is convenient to use "negligence" generallly to mean inadvertent negligence. If it is said that such-and-such a crime can be committed negligently, this means that the crime can be committed by inadvertent negligence; and the reader will understand that the crime can *a fortiori* be committed recklessly.
>
> In the law of tort negligence has an objective meaning. It signifies a failure to reach the objective standard of the reasonable man, and does not involve any inquiry into the mentality of the defendant. The same rule prevails in criminal law, in those spheres where negligence is recognised at all.

In my opinion the effect of s. 55(1) is to enact that a person who in driving a vehicle on a highway fails to reach the objective standard of the reasonable man in regard to the use of due care and attention or in regard to having reasonable consideration for other persons using the highway is guilty of an offence and subject to punishment.

In determining whether such a provision falls within s. 91(27) rather than within any of the heads of s. 92 we are entitled to consider its apparent purpose and effect and in doing this we must take into account any general knowledge of which the Court would take judicial notice.

For some years the increasing frequency of accidents on highways resulting in death, personal injury and damage to property has been a matter of grave public concern, and efforts to reduce the number of such accidents have occupied the attention of Parliament and of the provincial legislatures.

By the combined effect of sections 191(1) and 221(1) of the *Criminal Code* Parliament has made it a crime to be negligent in the operation of a motor vehicle provided that, whether the negligence consists of omission or commission,

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the person charged shows wanton or reckless disregard for the lives or safety of other persons; it is not a necessary element of this crime that the negligence charged shall cause injury or damage. To use the terminology of Glanville Williams, Parliament has enacted that "advertent negligence" in the operation of a motor vehicle is a crime. No counsel has questioned the competency of Parliament to enact these sections; it could not be successfully questioned. The application of these sections is not limited to the operation of motor vehicles on highways but it is obvious that in the vast majority of cases in which a charge is laid thereunder it will arise out of a highway accident.

We may, I think, take judicial notice of the fact that while many highway accidents resulting in death or injury are caused by "advertent negligence", very many are caused by "inadvertent negligence". Should Parliament in its wisdom decide that to stem the rising tide of death and injury it was advisable to make inadvertent negligence in the operation of a motor vehicle a crime as well as advertent negligence in such operation it would, in my opinion, clearly be enacting criminal law within the meaning of head 27 of s. 91. I did not understand any counsel to suggest that Parliament lacked the power to enact as part of the *Criminal Code* a provision identical with s. 55(1) should it see fit to do so. I think it clear that Parliament has such power and that if it saw fit to enact the provision contained in s. 55(1) that provision would in no sense be legislation merely ancillary or necessarily incidental to the exercise of the powers conferred upon Parliament by s. 91 (27); it would be an integral part of the criminal law.

In my opinion, while the types of negligence dealt with differ, the true nature and character of the legislation contained in s. 55(1) of the Manitoba Act does not differ in kind from that of the legislation contained in sections 191(1) and 221(1) of the *Criminal Code*. Each seeks to suppress in the public interest and with penal consequences negligence in the operation of vehicles, each is designed for the promotion of public safety, each seeks to prevent substantially the same public evil, each belongs to the subject of public wrongs rather than to that of civil rights, each makes negligence a crime although one deals with inadvertent negligence and the other with advertent negligence.

In my view the impugned sub-section differs generically from those provisions of *The Highway Traffic Act* prescribing detailed rules of conduct such as rates of speed, rules of the road, traffic signals, lights, equipment and so on; on this branch of the matter I have nothing to add to what has been said by Roach J.A.

If I am right in my conclusion that the provisions of the impugned sub-section if enacted by Parliament as part of the *Criminal Code* would clearly be a law in relation to the criminal law within the meaning of head 27 of s. 91, that would seem to be an end of the matter; the true nature and character of an enactment is to be discerned by a consideration of its meaning, purpose and effect, and does not depend upon whether it is enacted by Parliament or by a provincial legislature. The statement of Lord Watson in *Union Colliery Company of British Columbia v. Bryden*[1] has been repeatedly followed:

> The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91 of the Act of 1867.

It may well be that a growing public danger makes it desirable that inadvertent negligence in driving a motor vehicle should be made a crime. I do not express any opinion on this question which is one of public policy to be decided by Parliament. I think it clear that Parliament alone has the constitutional authority to so enact.

In my opinion there is no room in this case for the view that s. 55(1) is *intra vires* because it operates in an otherwise unoccupied field, for the field which the impugned legislation seeks to enter is one reserved exclusively for Parliament by head 27 of s. 91. This is a field which the provincial legislature is forbidden to enter whether or not Parliament has occupied any part of it.

There are two further matters which I wish to mention.

In the penultimate paragraph of his reasons Tritschler J.A. expresses the view that it is now easier to declare s. 55(1) *intra vires* of the legislature than it would have been

[1] [1899] A.C. 580 at 588, 68 L.J.P.C. 118.

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had the provision formerly contained in s. 285(6) of the old *Criminal Code* still been in force. That sub-section read as follows:

> (6) Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence. . . .

The validity of this view depends on the "overlapping doctrine", which is accurately defined in Varcoe on The Distribution of Legislative Power in Canada, 1954, at p. 47, as follows:

> There can be a domain in which provincial and Dominion legislative powers may overlap, in which case, a statute enacted pursuant to either power will be *intra vires* if the field is clear, but if the field is not clear and two statutes meet, the Dominion statute must prevail.

Assuming, contrary to the opinion that I have already expressed, that s. 55(1) has a provincial aspect and so would be valid until Parliament occupies the field in which it operates, it is necessary to consider whether Parliament has done so. In my opinion Parliament has fully occupied the field.

For the purpose of reducing the number of automobile accidents occuring on the highways throughout Canada, Parliament has decided to attach penal consequences to negligence in the course of a particular specified activity, i.e., the operation of a motor vehicle. The provisions of the *Criminal Code* now in force attach those consequences to advertent negligence in such operation; when s. 285(6) of the old Code was in force it was arguable that the words therein contained, "or in a manner which is dangerous to the public having regard to all the circumstances of the case" had the effect of attaching penal consequences to inadvertent negligence; be this as it may, it is clear that Parliament has the power to attach penal consequences to inadvertent negligence and to enact as a part of the *Criminal Code* the very provisions contained in s. 55(1).

In my opinion when Parliament has expressed in an Act its decision that a certain kind or degree of negligence in the operation of a motor vehicle shall be punishable as a

crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kinds or degrees of negligence shall be punishable but also what kinds or degrees shall not.

The matter may be tested in this way: suppose that Parliament in the new Code had enacted the provisions of s. 55(1) of *The Highway Traffic Act* as sub-section (2) of s. 221; in such circumstances the field which s. 55(1) seeks to enter would clearly be fully occupied by valid Dominion legislation; suppose then that a few years later Parliament repealed the said sub-section thereby indicating its view that the inadvertent negligence described in the repealed sub-section should cease to be punishable as an offence against the State; could it be said that upon such repeal a provincial legislature could enact the repealed sub-section as part of its *Highway Traffic Act?* In my opinion it could not, and it appears to me that the result of holding otherwise would be to defeat the intention of the framers of the *British North America Act* that power to legislate as to the criminal law should be committed exclusively to Parliament. It is not within the power of the provincial legislature to remedy what it regards as defects or to supply what it regards as unwise omissions in the criminal law as enacted by Parliament.

It appears to me to be self-evident that the exclusive legislative authority in relation to the criminal law given to Parliament by s. 91(27) must include the power to decide what conduct shall not be punishable as a crime against the state as well as to decide what conduct shall be so punishable, and this may be the reason that there is little authority precisely on the point; it has however been touched on by the Judicial Committee in the case of *Toronto Railway v. The King*[1]. The members of the Board were Viscount Haldane, Lord Dunedin, Lord Atkinson, Lord Parker of Waddington, Lord Parmoor, Lord Wrenbury and Sir Arthur Channell; Viscount Haldane who delivered the judgment said at page 639:

> Their Lordships think that it was competent to the Parliament of Canada under s. 91, sub-s. 27, of the British North America Act, 1867, which enables it exclusively to legislate as to criminal law, including

[1] [1917] A.C. 630, 86 L.J.P.C. 195.

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procedure in criminal matters, to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive.

The other matter to which I wish to refer is a submission in the argument of counsel for the Attorney General of Canada to the effect that had s. 55(1) read as follows:

> (1) Every person who drives a motor vehicle or a trolley bus on a highway shall do so with due care and attention and with reasonable consideration for other persons using the highway.
>
> (2) Every person who fails to comply with subsection (1) is guilty of an offence.

there would be no question of its validity. As to this argument it is my view that the validity of an impugned enactment depends not on the precise verbal form in which it is expressed but on the meaning of the words the legislature has used and the purpose and effect of the enactment. The question is one of substance. Had the impugned sub-section been enacted in the form suggested I would have been equally of opinion that it was invalid. Were it otherwise a law in relation to the crime of theft could, by careful draftsmanship, be made to read as a law dealing with the civil right to the possession of personal property and a law in relation to highway robbery could be framed as a regulation of highway traffic.

For the above reasons and for those given by Adamson C.J.M. in the case at bar and by Roach J.A. in *Yolles'* case with which I have already expressed my full agreement I am of opinion that s. 55(1) of *The Highway Traffic Act*, R.S.M. 1954, c. 112, is *ultra vires* of the Legislature of the Province of Manitoba.

I would allow the appeal with costs throughout, set aside the judgments below and direct that an order of prohibition issue. I would make no order as to the costs of the Attorneys-General who intervened.

RITCHIE J.:—I agree with Judson J. that s. 55(1) of the Manitoba *Highway Traffic Act* is valid provincial legislation enacted for the regulation and control of traffic on the highways of that province and that there is a fundamental difference between the subject-matter dealt with in that section and any behaviour which is proscribed as criminal by the provisions of the *Criminal Code*.

I would, accordingly, dismiss this appeal.

Appeal dismissed without costs, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

Solicitor for the applicant, appellant: H. P. Blackwood, Winnipeg.

Solicitor for the respondent: The Attorney-General of Manitoba.