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VALIDITY OF SECTION 92(4) OF THE VEHICLES ACT, 1957 (SASK.)

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Validity of s. 92(4) of The Vehicles Act, 1957 (Sask.), c. 93—Breath tests for alcohol in motor vehicles cases—Suspension or revocation of driver's licence if breath sample not given—Whether conflict with criminal law—Whether results of test admissible in criminal proceedings—Criminal Code, ss. 222, 223, 224.

Section 92(4) of *The Vehicles Act,* 1957 (Sask.), c. 93, which provides for the suspension or revocation of an automobile driver's licence where, *inter alia,* being suspected of driving or of having driven while under the influence of intoxicating liquor, he refuses to permit a sample of his breath to be taken, is not *ultra vires,* in whole or in part. (*per* Taschereau, Rand, Fauteux, Abbott and Judson JJ.; Locke, Cartwright and Martland JJ., *contra.*)

The result of the chemical analysis of such a sample of a person's breath obtained under s. 92(4) is admissible in evidence in any proceedings against him under s. 222 or s. 223 of the *Criminal Code,* on the issue whether he was intoxicated or had his ability impaired by alcohol, whether or not the provisions of s. 92(4) were brought to his attention before he gave the sample (*per Curiam*).

Per Taschereau, Fauteux, Abbott and Judson JJ.: There is no repugnancy between s. 92(4) of *The Vehicles Act* and the *Criminal Code.* In s. 224 of the Code, Parliament has declared that "for the purposes of this section" there is no obligation for a person to give a sample of his breath and barred evidence or comment as to the refusal to give a sample or as to the fact that one was not taken; and by the same words indicated its intention not to trench upon the right of a province to create, for provincial purposes, a legal obligation to give a sample. The section does not have the effect of excluding from the evidence in proceedings under s. 222 or s. 223 of the *Criminal Code* the result of a test taken under s. 92(4) of *The Vehicles Act.*

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

**The Chief Justice, owing to illness, took no part in the judgment.

Section 92(4) of *The Vehicles Act* does not create a legal obligation to give a sample. It leaves to the licence-holder the faculty to comply with or ignore what is a request and not a requirement; non-compliance with the request does not amount to a violation of the enactment.

Even if it could be held that in effect, if not in terms, the impugned legislation creates a statutory compulsion, it does not clash with s. 224(4). The words "for the purposes of this section" imply that, for purposes other than criminal proceedings, a person might be required to give a sample. The situation dealt with in s. 224(4) is not one arising when a sample has been given or taken, but when it has not.

Furthermore, the impugned legislation is not legislation in relation to criminal law but in relation to the administration and control of highways in the province for the protection of the travelling public and of the automobile insurance fund created under the provincial legislation.

Per Rand J.: Section 92(4) of *The Vehicles Act* does not fall within the prohibition of s. 224. The word "required" in s. 224(4) is to be taken as envisaging an effective compulsion such as that exerted against a recalcitrant witness, *i.e.*, commitment for contempt; and the effect of the refusal to give a sample, that it may be used as evidence by the province in deciding upon the suspension or cancellation of a driver's licence, is not of that nature. It follows that the analysis of a sample of breath obtained under s. 92(4) is voluntarily furnished and is admissible as evidence in prosecutions under s. 222 or s. 223. There is, thus, no evidentiary inconsistency between different offences.

Per Locke and Cartwright JJ.: Section 92(4) of *The Vehicles Act* of Saskatchewan invades a field fully occupied by valid legislation of Parliament, is in direct conflict with that legislation and cannot stand.

Parliament has seen fit to declare in subs. 224(4) not only that a person is not required to give a sample but also that the fact of his refusal shall not be given in evidence or made the subject of comment. Section 92(4) deals with a person in the same situation and its direct effect is to require such person to give a sample of his breath under pain of losing his driver's licence.

Even if it were to be assumed, for purposes of this appeal, that the provincial enactment would be *intra vires* if the field was clear, it has the direct effect of nullifying throughout the province the prohibition of s. 224(4). The words "for the purposes of this section" do not confine the effect of that section so as to leave unoccupied a field of legislation which is competent for a province to enter, on the contrary, s. 92(4) is directed solely to a person requested by the police to allow the taking of a sample for the purposes of s. 224(4).

Even though it would be an illegal act to prevail upon a person to give a sample of breath by threatening him with loss of his permit, and contrary to s. 224(4), that illegality would not render inadmissible the evidence of the result of the chemical analysis of the sample so obtained.

Per Locke and Martland JJ.: Section 92(4) falls within the second branch of the fourth proposition enunciated by Lord Tomlin in *Attorney General for Canada v. Attorney General for British Columbia,* [1930] A.C. 111 at 118. The field is not clear. Section 224(4) means that a person is to be free to decide whether or not he will give a sample of breath for chemical analysis. Section 92(4) comes into operation in

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cases where there is a suspicion that there has been committed a breach of s. 222 or s. 223, and means that a person suspected of such an offence must submit to a breath test or suffer the penalty of losing his right to drive. The two legislations therefore meet and the provisions of the *Criminal Code* must prevail.

Furthermore, there is repugnancy between the impugned provincial legislation and the *Criminal Code*.

Since s. 92(4) is *ultra vires*, there is no compulsion by its operation and consequently the results of the chemical analysis would be admissible in proceedings under s. 222 or s. 223.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], on a reference by the Lieutenant-Governor in Council.

E. L. Leslie, Q.C., and *R. S. Meldrum, Q.C.*, for the Attorney-General of Saskatchewan.

E. D. Noonan, Q.C., appointed by the Court of Appeal in opposition.

D. H. W. Henry, Q.C., for the Attorney General of Canada.

W. B. Common, Q.C., for the Attorney-General for Ontario.

The judgment of Taschereau, Fauteux, Abbott and Judson JJ. was delivered by

FAUTEUX J.:—Pursuant to the *Constitutional Questions Act*, R.S.S. 1953, c. 78, the Lieutenant-Governor in Council of the Province of Saskatchewan referred to the Court of Appeal two questions for hearing and consideration, the substance of which being:

(i) Whether subs. (4) of s. 92 of *The Vehicles Act, 1957* (Sask.), c. 93,—which empowers the Highway Traffic Board to suspend or revoke the driving license of any license-holder who, amongst other cases provided, "when suspected of driving, or of having driven, a motor vehicle while under the influence of intoxicating liquor, he refused to comply with the request of a police officer or police constable that he submit to the taking of a specimen of his breath"—is, in whole or in part, *ultra vires* of the Saskatchewan Legislative Assembly; and

[1] (1958), 12 D.L.R. (2d) 470, 24 W.W.R. 385, 27 C.R. 369, 12 C.C.C. 129.

(ii) Whether, in any proceedings, in Saskatchewan, under s. 222 or s. 223 of the *Criminal Code* of Canada, the result of a chemical analysis of such a specimen is, on the issue whether the accused was intoxicated or had his ability to drive impaired by alcohol, admissible in evidence where, before he gave a sample of his breath, (*a*) the provisions of subs. (4) of s. 92 of the provincial Act were brought to his attention and (*b*) where such provisions were not brought to his attention.

The following opinion was delivered by the Court of Appeal[1] on February 11, 1958:

As to the first question. The majority held the provincial enactment *intra vires* as being, in the views of Martin C.J.A. and Culliton J.A., legislation in relation to the administration and control of highways in the Province and, in the views of Gordon J.A., legislation for the protection of the travelling public on the highways and of the automobile insurance fund created under provincial legislation, *i.e. The Automobile Accident Insurance Act*; McNiven J.A. held it *ultra vires* as being an invasion of the field of criminal law and criminal procedure.

As to the second question, Martin C.J.A., Culliton and McNiven JJ.A. concluded to the inadmissibility of the evidence on the ground that subs. (4) of s. 224 of the *Criminal Code* has the effect of excluding from prosecution such evidence obtained under the compulsion of provincial enactment, Gordon J.A., on the contrary, held such evidence admissible on the ground that subs. (4) of s. 224 merely gives the suspected driver the right to refuse a sample of his breath and protects him only in that refusal, being also of opinion that the provincial enactment does not amount to a form of compulsion.

Hence the appeal of the Attorney-General of Saskatchewan and the cross-appeal of E. D. Noonan, Q.C.,—counsel appointed by the Court of Appeal pursuant to s. 6 of *The Constitutional Questions Act* to argue in opposition to the submissions of the Attorney-General for Saskatchewan—against the majority opinion given by the Court on the second and the first question, respectively.

[1] (1958), 12 D.L.R. (2d) 470, 24 W.W.R. 385, 27 C.R. 369, 120 C.C.C. 129.

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The primary objection against validity being that of repugnancy with the *Criminal Code*, it is necessary to consider and construe the relevant provisions of both s. 224 of the Code and s. 92 of *The Vehicles Act, 1957*.

The Criminal Code. The provisions of s. 224 are admittedly procedural in nature and purposely ancillary to those of ss. 222 and 223 which create respectively the offence of driving while intoxicated and the offence of driving while ability to drive is impaired by alcohol. Subsections 224(3) and 224(4) read as follows:

> (3) In any proceedings under section 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.
>
> (4) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

Prior to the enactment of the predecessors to s. 224(3) and s. 224(4), *i.e.*, s. 285(4)(*d*) and s. 285(4)(*e*), a minority in the judiciary had expressed certain doubts as to the evidentiary value and relevancy of the results of a chemical analysis of a bodily substance or held the view that a warning, of the nature of the one governing the admissibility of confessions, was a condition precedent to the admissibility of such evidence on the issue of intoxication or impaired ability under what is now ss. 222 and 223. In enacting what is now in s. 224(3), Parliament disposed of this conflict in judicial opinion but did not, as indicated in the reasons for judgment of this Court in *Attorney General of Quebec v. Bégin*[1], make any innovation as to the law but simply stated what it actually was. Indeed the confession rule requiring a warning, exclusively concerns *self-incriminating statements* of the accused, and aims at the exclusion of those which are untrue. As its subject-matter or purpose, the confession rule does not embrace the *incriminating conditions* of the body, features, finger-prints,

[1] [1955] S.C.R. 593, 5 D.L.R. 394, 21 C.R. 217, 112 C.C.C. 209.

clothing or behavior of the accused, that persons, other than himself, observe or detect and ultimately report as witnesses in judicial proceedings.

Having thus settled the matter by reiterating by the provisions of s. 224(3) that there was no duty to warn a person that he need not give a sample and that the result of its analysis might be used in evidence, Parliament, by those in s. 224(4), added that "No one is required to give a sample of blood.... for chemical analysis, for the purposes of this section" and that the refusal to do so or the non-taking of a sample could not be proved or commented upon in proceedings under s. 222 or s. 223.

The first of these two additions does not derogate from the general law, according to which no one, failing a statutory requirement to the contrary, is obliged, in law, to give a sample. In saying what it said, Parliament, in my view, simply intended to forestall, *ex abundanti cautela,* any suggestion that the creation of a legal obligation was intended in the provisions now found in s. 224. By these amendments to the Code, the choice is not taken away from the suspected person. There is nothing, either express or implied in this part or in the whole of the section, indicating that Parliament was at all concerned with the nature of the reasons which, in any particular case, might in fact have a decisive influence on the mind of a suspected person, as is the case under the confession rule. Nor can I find, in this provision, the manifestation of any intent of Parliament to trench—as it possibly might have done as a step genuinely taken in relation to criminal procedure—upon the right of a provincial Legislature to create, for genuine provincial purposes, a legal obligation to give a sample. Effect must be given to the words "for the purposes of this section" which, qualifying the range of this part of the provision, are indicative of the true intent of Parliament.

The prohibitive enactment, in the latter part of s. 224(4), derogates from the prior law, in that it bars, in any proceedings under s. 222 or s. 223, evidence or comment as to the fact of the refusal to give a sample or as to the fact that a sample was not taken. Thus, in these proceedings, the possibility of any inference whatever, being drawn from

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evidence or comment with respect to either one of these two facts, is definitely ruled out; and to this extent goes the derogation.

Counsel for the Attorney General of Canada construed s. 224(4) as having the consequential effect of excluding from the evidence the result of a test taken without a consent of the suspected person. This construction is predicated on the presence, in the enactment, of the declaration that no one is required to give a sample and of the prohibition as to evidence and comment. I am unable to agree with this submission. What, in my view, is the purpose of the declaration has already been indicated. The prohibition itself is absolute. While it might be said to confer an immunity against incriminating inferences, it rules out definitely any inference—likely or not to affect the case for the prosecution or the case for the defence—which might be drawn, not only from the refusal to give a sample, but also from the fact that none was actually taken. Moreover, the submission implies the assumption, which can hardly have been that of Parliament, that in all cases where a sample would be taken notwithstanding refusal, the result of its analysis would be incriminating; fear of incrimination is assumed to be the only possible reason for either a refusal to give a sample or the fact that none was actually taken. The acceptance of this submission would lead to the exclusion from the evidence, not only of incriminating but also of such exculpating evidence as might result from the actual taking of a test notwithstanding refusal. When enacting the provisions of s. 224(4), Parliament is presumed to have had in mind (i) the rule of evidence according to which evidence, obtained unlawfully or under compulsion of law, is not for that reason alone, inadmissible, *Kuruma v. The Queen*[1], *Attorney General of Quebec v. Bégin* (*supra*) and *Rex v. Walker*[2], and (ii) the rule of construction according to which a Legislature will not be presumed to have departed from the general system of the law without expressing an intention to do so with irresistible clearness. The language, here used by Parliament, is not apt to indicate an intent such as the one contended for.

[1] [1955] A.C. 197, [1955] 1 All E.R. 236.
[2] [1939] S.C.R. 214, 2 D.L.R. 353, 71 C.C.C. 305.

The Vehicles Act, 1957. Section 92(4), in the context of which is found the impugned provision, *i.e.*, s. 92(4)(*d*), reads as follows:

> (4) The board may suspend an operator's, chauffeur's, learner's or instructor's licence for a period not exceeding ninety days if, after an examination of the circumstances, it is satisfied:
>
> (*a*) that the holder thereof is afflicted with or suffering from such physical or mental disability or disease as might prevent him from exercising reasonable and ordinary control over a motor vehicle; or
>
> (*b*) that he is not well skilled in the operation of a motor vehicle; or
>
> (*c*) that his habits or conduct are such as to make his operation of a motor vehicle dangerous to public safety; or
>
> (*d*) that, when suspected of driving, or of having driven, a motor vehicle while under the influence of intoxicating liquor, he refused to comply with the request of a police officer or police constable that he submit to the taking of a specimen of his breath;
>
> and if, after a hearing of which reasonable notice has been given to the holder of the licence and after a further examination of the circumstances, the board is again so satisfied it may suspend the licence for a stated period or revoke it.

As a matter of construction, it is suggested that the impugned enactment compels, in law or at least in effect, one to do what, in a similar situation, s. 224(4) of the *Criminal Code* says he is not legally obliged to and, for this reason, the former provision is held *ultra vires,* as repugnant to the latter.

With deference, I am unable to agree with this submission. In terms, the provincial enactment creates no legal obligation. It leaves, to the license-holder, the faculty to comply with or ignore what is a request and not a requirement; and no one suggested that non-compliance with the request amounts to a violation of the enactment. Indeed and under the provision, the suspected license-holder has the same right and is in a position similar to that of a person who, being suspected of physical or mental affliction likely to prevent the exercise of reasonable care and ordinary control over a motor vehicle, is requested, as a condition precedent to the issuance or maintenance of a driving license, to submit to an examination. In either case, to deprive the suspected person of a license, because of non-compliance, might be adopting a measure prejudicial to that person but nonetheless necessary to enable the provincial authorities to adequately discharge their duty to protect the users of the road. In either case, the difficulty

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and the consequences of the choice of the suspected person do not affect the nature of his rights and are, *per se,* ineffective to create a legal obligation.

Even if it can be held, as is suggested, that in effect, if not in terms, the impugned provision does create statutory compulsion, on a considered view of the true character of s. 224(4) of the *Criminal Code,* the former provision does not clash with the latter. I have already indicated that in stating "No one is required to give a sample . . . for chemical analysis, *for the purposes of this section",* Parliament, in my view, simply meant to silence any suggestion that the amendments then made carried an obligation to give a sample for the purposes of these criminal proceedings. In the statement itself, there is an implication that, for purposes other than criminal proceedings, one might be required to give a sample. This implication, consonant with the general law, negatives any intent of Parliament to invade the field in such a way as to trench upon provincial jurisdiction to create such an obligation for genuine provincial purposes. And it is significant that, as above indicated, Parliament did not see fit, on the occasion, to depart, as it might have done, from the general rule of evidence according to which the result of a test authorized for genuine provincial purposes is admissible in evidence in criminal proceedings. The situation dealt with in s. 224(4) is not the one arising when a sample has been given or taken but when it has not. I cannot therefore see the alleged conflict and hold that the impugned enactment will operate to prevent the attainment of the object of s. 224 of the *Criminal Code* according to its true intent, meaning and spirit.

I am also in respectful agreement with the view that the impugned legislation is not, as contended, legislation in relation to criminal law but in relation to the administration and control of highways in the province for the protection of the travelling public and of the automobile insurance fund created under the provincial legislation. That the provinces have undisputed authority to issue licenses or permits for the right to drive motor vehicles on their highways and that this authority carries with it the authority to suspend or cancel them upon the happening of certain conditions, are undoubted principles. *Provincial Secretary*

of P.E.I. v. Egan[1]. What, in the latter decision, was said, particularly by Sir Lyman Duff, in affirmation of validity, finds its application in this case.

I would, therefore, answer the questions as follows:

Question 1. Subsection (4) of s. 92, para. (*d*) is not *ultra vires* of the Legislative Assembly of Saskatchewan in whole or in part;

Question 2. The result of a chemical analysis of the breath of a person taken under s. 92, subs. (4)(*d*) is admissible in prosecutions under ss. 222 and 223 of the *Criminal Code*.

RAND J.:—The Lieutenant-Governor in Council of Saskatchewan has submitted to the Court of Appeal for that province the following questions:

(1) Is subsection (4) of section 92 of *The Vehicles Act*, 1957, Statutes of Saskatchewan, 1957, Chapter 93, *ultra vires* of the Legislative Assembly of Saskatchewan in whole or in part?

(2) In any proceedings in Saskatchewan under sections 222 or 223 of the *Criminal Code* of Canada is the result of a chemical analysis of a sample of breath of a person admissible in evidence on the issue whether that person was intoxicated or whether his ability to drive was impaired by alcohol

(*a*) where the provisions of subsection (4) of section 92 of *The Vehicles Act*, 1957 were brought to the attention of the accused before he gave a sample of his breath for chemical analysis;

(*b*) where the provisions of subsection (4) of section 92 of *The Vehicles Act*, 1957 were not brought to the attention of the accused before he gave a sample of breath for chemical analysis.

Section 92, subs. (4), para. (*d*) of *The Vehicles Act, 1957*, the controlling paragraph, provides:

(4) The board may suspend an operator's, chauffeur's, learner's or instructor's licence for a period not exceeding ninety days if, after an examination of the circumstances, it is satisfied:

* * *

(*d*) that, when suspected of driving, or of having driven, a motor vehicle while under the influence of intoxicating liquor, he refused to comply with the request of a police officer or police constable that he submit to the taking of a specimen of his breath;

and if, after a hearing of which reasonable notice has been given to the holder of the licence and after a further examination of the circumstances, the board is again so satisfied it may suspend the licence for a stated period or revoke it.

By ss. 222, 223 and 224 of the *Criminal Code*:

222. Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of

[1] [1941] S.C.R. 396, 3 D.L.R. 305, 76 C.C.C. 227.

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(a) an indictable offence and is liable

* * *

(b) an offence punishable on summary conviction and is liable

* * *

223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable

* * *

224. . . .

(3) In any proceedings under sections 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.

(4) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

I take the rule of immunity from incriminating evidence to be confined to that which bears a testimonial character: *Attorney-General of Quebec v. Begin*[1]; this judgment, in my opinion, decides that matters of fact elicited from an individual not of that character do not come within it. Whether the use, therefore, under the provincial statute here, of a refusal to give a sample of blood or other substance as evidence for provincial purposes, not conflicting with that protective rule of criminal law, is within the competence of the province, and its admissibility in a prosecution under s. 222 or s. 223 of the Code, depend upon whether or not it is within the prohibition of s. 224.

That section declares that "no person is required to give a sample" of blood or other substance, and that the fact of a refusal to give it, or that it was not taken, is inadmissible, with comment on either fact likewise forbidden; permitting the sample to be taken is to be voluntary. The controlling word is "required"; what modes of coercion are by that word contemplated which will clash with the immunity given? As the section deals with matter analogous to self-incrimination we should look to the nature of the com-

[1] [1955] S.C.R. 593, 5 D.L.R. 394, 21 C.R. 217, 112 C.C.C. 209.

pulsion against which that rule is a shield, and that by which disclosure is enforced where the privilege is taken away. By s. 5(1) of the *Canada Evidence Act* a witness is not excused from answering on the ground that the answer may incriminate him or subject him to civil liability; if he refuses, by what means is the obligation to answer enforced? The word "required" is to be taken as envisaging similar means, an effective compulsion such as that, for example, exerted against a recalcitrant witness, commitment as for contempt. Is the effect of a refusal to give a sample, that it may be used as evidence by the province in deciding upon the suspension or cancellation of an automobile license, of that nature?

The answer to this must take into account a consideration of the impact on a constantly intensifying traffic of persons and vehicles on the highways of their use by automobiles, and its ghastly results from mere carelessness in operation alone. When to the lethal dangers inherent and multiplying under the best of ordinary circumstances we add the most potent and destructive factor, the intoxicated driver, a stage has been reached where the public interest rises to paramount importance.

The analogous rule against self-incrimination is one for the protection not of the guilty, but of the innocent; and the grounds underlying it are the dangers of compulsion not only in bringing about incrimination to the innocent but, as Professor Wigmore points out, in its inevitable abuse and the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice in criminal matters.

Under s. 92(4)(*d*) the danger to the innocent is virtually non-existent; only a failure either in the analysis itself or in the honesty of the technician can be said to present a hazard; and when the only result of either an incriminating analysis, or the initial refusal to give a sample, is the use of the one or other fact as relevant to a decision on a license, the imperious concern of the public overbears, as factors of error, those speculative possibilities. This result of a minor and only an indirect inference from a refusal to give is in extreme contrast with the commitment of a witness until his contempt is purged, drastic enough but not to be compared with the ancient practice of torture.

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The consequence of refusal under s. 92(4)(*d*) is not, in my opinion, within the contemplation of s. 224; the disclosure, if induced, presents only a most unlikely possibility of prejudice to an innocent person, and even should he stand on his refusal arbitrarily in an exaggerated assertion of personal dignity, the worst that can happen is to be deprived of what, in his case, may be a questionable privilege.

From this it follows that the analysis of a sample of breath obtained under s. 92(4)(*d*) is voluntarily furnished and is admissible as evidence in prosecutions under s. 222 or s. 223 by s. 224 or any other sections of the Code. There is thus no evidentiary inconsistency between different offences as was suggested on the argument.

I would, therefore, answer the questions as follows:

Question 1. Subsection (4) of s. 92, para. (*d*) is not *ultra vires* of the Legislative Assembly of Saskatchewan in whole or part;

Question 2. The result of a chemical analysis of the breath of a person taken under s. 92, subs. (4)(*d*) is admissible in prosecutions under ss. 222 and 223 of the *Criminal Code*.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—The questions submitted by the Lieutenant-Governor in Council of Saskatchewan to the Court of Appeal for that Province and the relevant statutory provisions are set out in the reasons of my brother Rand.

I have reached the conclusion that the answers to the questions should be as follows:

To Question (1): Clause (*d*) of subsection (4) of section 92 of *The Vehicles Act*, 1957, Statutes of Saskatchewan, 1957, Chapter 93 is *ultra vires* of the Legislative Assembly of Saskatchewan.

To Question (2): (*a*): Yes.
(*b*): Yes.

In my opinion, s. 224(3) and s. 224(4) of the *Criminal Code* are *intra vires* of Parliament as being legislation, under head 27 of s. 91 of the *British North America Act*, in relation to "the Criminal Law . . . including the Procedure in Criminal Matters" and the subject-matter of these subsections is not merely ancillary, or necessarily incidental, to Criminal Law and the Procedure in Criminal Matters but is an integral part thereof.

For some time it has been criminal for a person to drive a motor vehicle while intoxicated or while his ability to drive is impaired by alcohol. These crimes are now set out in ss. 222 and 223 of the *Criminal Code*.

Of recent years it has been generally accepted that the result of a chemical analysis of a sample of the breath of a person is of some assistance in determining whether he was intoxicated or whether his ability to drive a motor vehicle was impaired by alcohol. There have been differences of judicial opinion as to the circumstances under which evidence of the result of a chemical analysis of the sort mentioned could be legally admitted on the trial of a criminal charge; some of the cases in which these differences arose are referred to in *Attorney-General for Quebec v. Begin*[1].

In my opinion, it is unnecessary, for the decision of the first question, to consider whether in enacting s. 224(3) and s. 224(4), or their predecessors s. 285(4*d*) and s. 285(4*e*), Parliament made any change in the pre-existing law. Those subsections now declare the law, and whether or not what they enact was previously the common law it is now the statute law of Canada.

From their terms it is obvious that s. 224(3) applies in any proceedings under s. 222 or s. 223 and that s. 224(4) comes into play when a person is suspected of having committed an offence against either of those sections. Section 224(4), then, deals with a person who is suspected of having committed an offence against s. 222 or s. 223. It is clear from the wording of the subsection that Parliament contemplates that a person in that situation may be asked to give a sample of his breath but is left free to consent or to refuse; Parliament has seen fit to declare not only that he is not required to give the sample but also that the fact of his refusal shall not be given in evidence or made the subject of comment in proceedings under the sections mentioned. It appears to me that s. 92(4) of *The Vehicles Act* of Saskatchewan deals with a person in the same situation as that dealt with by s. 224(4) of the *Criminal Code* and that its direct effect is to require such person to give a sample of his breath under pain of being liable to be temporarily or permanently prevented from driving a motor

[1] [1955] S.C.R. 593, 5 D.L.R. 394, 21 C.R. 217, 112 C.C.C. 209.

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vehicle in the Province of Saskatchewan, a penalty which in the case of some individuals might amount to a deprivation of livelihood.

For the purposes of this appeal I am prepared to assume, although I regard it as doubtful, that s. 92(4)(*d*) of *The Vehicles Act* would be *intra vires* of the Legislature if, to use the words of Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia*[1], the field was clear; but its direct effect appears to me to be to nullify throughout the Province of Saskatchewan the provision in s. 224(4) of the *Criminal Code* that a person in the circumstances mentioned above is not required to give a sample of breath. Whatever be the precise meaning given to the word "required", unless it is to be restricted to "compelled by irresistible physical force", I am of opinion that a statute declaring that a person who refuses to do an act shall be liable to suffer a serious and permanent economic disadvantage does "require" the doing of the act. With deference to those who hold a contrary view, it appears to me to be playing with words to say that a person who is made liable to a penalty (whether economic, pecuniary, corporal or, I suppose, capital) if he fails to do an act is not required to do the act because he is free to choose to suffer the penalty instead.

It was suggested in argument that the words "for the purposes of this section" contained in s. 224(4) of the *Criminal Code* confine the effect of that subsection so as to leave unoccupied a field of legislation which it is competent for the Province to enter. I am unable to see how this argument assists the case of those who seek to support the provincial legislation, as it seems clear that s. 92(4)(*d*) of *The Vehicles Act* is directed solely to a person requested by a police officer to allow the taking of a specimen of his breath for the purposes of s. 224, *i.e.*, to enable a chemical analysis to be made the result of which may be admitted in evidence pursuant to s. 224(3).

For these reasons I am of opinion that s. 92(4)(*d*) of *The Vehicles Act* of Saskatchewan invades a field fully occupied by valid legislation of Parliament, is in direct conflict with that legislation, and cannot stand.

[1] [1930] A.C. 111 at 118, 1 D.L.R. 194.

In view of the answer which I think should be given to question 1, question 2 appears to become comparatively unimportant, but, in my opinion, it falls within the reasoning of this Court in *Attorney-General for Quebec v. Bégin* (*supra*). At common law the evidence, being that of the existence of an objective fact, would, if relevant, have been admitted, although illegally obtained; and I am unable to construe the wording of s. 224(4) of the *Criminal Code* as showing an intention to change the law in this regard. Clear and unambiguous words would, I think, be necessary to effect such an alteration in the law of evidence.

To prevail upon a person, suspected of an offence against s. 222 or s. 223 of the Code, to give a sample of breath by threatening him with loss of his permit to drive should he refuse would, in my opinion, be contrary to s. 224(4) and an illegal act; but that illegality would not render inadmissible the evidence of the result of a chemical analysis of the sample so obtained.

For these reasons I would answer Question 2(*a*) and (*b*) in the affirmative.

The judgment of Locke and Martland JJ. was delivered by

MARTLAND J.:—I agree with the conclusions of my brother Cartwright.

With respect to the first question in the reference, the issue has been clearly stated in the factum of the appellant, the Attorney-General of Saskatchewan, as follows:

> The real question here is, it is submitted, whether or not there is any conflict between the provisions of the *Criminal Code* of Canada dealing with the offences commonly referred to as drunken driving and driving while impaired which provisions are set out in the Reference and the provisions of Subsection (4)(*d*) of Section 92 of *The Vehicles Act*.

Counsel for the appellant contended that this subsection was *intra vires* of the Saskatchewan Legislature because it came within the first branch of the fourth proposition enunciated by Lord Tomlin in *Attorney General for Canada v. Attorney General for British Columbia*[1], which states:

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

[1] [1930] A.C. 111 at 118, 1 D.L.R. 194.

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In my view the subsection falls within the second branch of this proposition. The field is not clear. Subsection (4) of s. 224 of the *Criminal Code* specifically enacts that no person is required to give a sample of breath for the purposes of that section. I interpret this to mean that, in relation to criminal proceedings under s. 222 for driving while intoxicated, or under s. 223 for driving while impaired, a person is to be free to decide whether or not he will give a sample of breath for chemical analysis. Paragraph (*d*) of subs. (4) of s. 92 of *The Vehicles Act* gives power to the Highway Traffic Board to suspend or revoke a licence to drive if it is satisfied that the holder, when suspected of driving or having driven a motor vehicle while under the influence of intoxicating liquor, refuses to comply with a request of a police officer or constable that he submit to the taking of a specimen of his breath. It comes into operation in cases where there is a suspicion that there has been committed a breach of s. 222 or s. 223 of the *Criminal Code*. It means that a person suspected of having committed such an offence must submit to a breath test or suffer the penalty of losing his right to drive a motor vehicle. The two legislations therefore meet and the provisions of the *Criminal Code* must prevail.

It was contended that the decision of this Court in *Provincial Treasurer of Prince Edward Island v. Egan*[1], was authority to support the validity of the provincial enactment. In that case the legislation in question provided that the licence to operate a motor vehicle of a person convicted of driving a vehicle while under the influence of intoxicating liquor or drugs should automatically be suspended. As was pointed out by counsel who argued in opposition to the validity of the Saskatchewan legislation, the statutory provision in question in the *Egan* case only became applicable after there had been a conviction under the *Criminal Code*. There was no conflict as between it and the provisions of the *Criminal Code*.

Further, it is to be noted that Duff C.J.C., in the *Egan* case says at p. 402:

> In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be

[1] [1941] S.C.R. 396, 3 D.L.R. 305, 76 C.C.C. 227.

brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative.

For the reasons previously given, I think there is such repugnancy in the present case.

With regard to the second question in the reference, it was common ground between counsel that the question was to be interpreted as (a) referring to a breath test taken at the request of a police officer or constable under s. 92(4)(*d*) of *The Vehicles Act* and (b) referring to the admissibility of the evidence as against the accused.

Having found that s. 92(4)(*d*) is *ultra vires* of the Legislative Assembly of Saskatchewan, I agree with the contention of counsel for the Attorney General of Canada that the results of chemical analyses of samples of breath would be admissible as against the accused in proceedings under s. 222 or s. 223 of the *Criminal Code* because, in view of that finding, there is no compulsion by operation of that subsection.

I would therefore hold that paragraph (*d*) of subs. (4) of s. 92 is *ultra vires* of the Legislative Assembly of the Province of Saskatchewan and that both questions 2(*a*) and 2(*b*) of the reference should be answered in the affirmative.

Solicitor for the Attorney-General of Saskatchewan: J. L. Salterio.

Solicitor appointed by the Court of Appeal in Opposition: E. D. Noonan.

Solicitor for the Attorney General of Canada: W. R. Jackett.

Solicitor for the Attorney General of Ontario: C. R. Magone.