CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF SECTION 5(A) OF THE DAIRY INDUSTRY ACT, R.S.C. 1927, CHAPTER 45.

1948

*Oct. 5, 6, 7, 8

*Dec. 14

Constitutional law—Whether section 5(a) of Dairy Industry Act, R.S.C. 1927, c. 45 is ultra vires of Parliament—Constitutional validity—Criminal law—Trade and Commerce—Agriculture—Property and Civil Rights—Importation—B.N.A. Act, ss. 91, 92, 95.

Subsection *a* of Section 5 of the Dairy Industry Act provides that "no person shall manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream."

The Governor-in-Council referred to this Court under section 55 of the Supreme Court Act the following question: Is section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, c. 45, *ultra vires* of the Parliament of Canada in whole or in part and if so in what particular or particulars and to what extent?

Held that the prohibition of importation of the goods mentioned in the section is *intra vires* of Parliament as legislation in relation to foreign trade. Locke J. finds the whole section to be *ultra vires* while expressing no opinion as to the power of Parliament to ban importation by appropriate legislation, the prohibition of importation being merely ancillary to the other prohibitions.

Held, The Chief Justice and Kerwin J. dissenting, that the prohibition of manufacture, offer, sale or possession for sale of the goods mentioned is *ultra vires* of Parliament. It is legislation in relation to property

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*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Locke JJ.

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and civil rights which cannot be supported under any head of section 91. Nor can it be supported as legislation for the peace, order and good government of Canada.

Per The Chief Justice (dissenting): The Dairy Industry Act is within the domain of the Dominion as a law in relation to agriculture and this cannot be discarded on the ground that the products here in question are articles of trade or commodities which are not directly the product of agriculture. (Eastern Terminal Elevators not applicable). Therefore the insertion of section 5(*a*) being an insertion in the Dairy Industry Act is nothing more than the direct exercise of Parliament's jurisdiction over agricultural matters or at least necessarily incidental and necessary for the effective control of agricultural matters in respect of milk and its by-products; and the mere contention that they are not natural products but rather manufactured articles is not sufficient to remove them from the domain of the federal government in respect of agriculture.

The legislation deals with trade and commerce and is not limited to the regulation of one particular trade or of one particular commodity, nor to one, or more than one, province; it is an Act embracing the whole Dominion. Furthermore, the so-called prohibition in section 5(*a*), when read in conjunction with the whole Act, is not a prohibition at all, but a regulation of trade and commerce, for in regulating, one may prohibit things which are not in accordance with those regulations.

It would seem to me that the manufacture, import or sale of these goods, if thought injurious to the manufacture and sale of butter which concerns such a large and important section of Canada, can hardly be said not to be of national concern.

Per The Chief Justice and Kerwin J. (dissenting): There is no ground on which it may be held that the legislation here in question, on its true construction, is not what it professes to be, that is, an enactment creating a criminal offence in exercise of the powers vested in Parliament by head 27 of section 91. (Proprietary Trade Articles case).

Reciprocal Insurers case [1924] A.C. 328; *King* v. *Eastern Terminal Elevators* [1925] S.C.R. 457; *Lower Mainland Dairy* case [1933] A.C. 168; *Natural Products Reference* [1936] S.C.R. 410; *Canada Temperance Federation* case [1946] A.C. 193 and *Proprietary Trade Articles* case [1931] A.C. 310 referred to.

REFERENCE by His Excellency the Governor General in Council (P.C. 3365, dated July 27, 1948) to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the Supreme Court Act (R.S.C. 1927, c. 35) of the following question: Is section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, c. 45, *ultra vires* of the Parliament of Canada in whole or in part and if so in what particular or particulars and to what extent?

The Order in Council referring this question to the Court is as follows:

WHEREAS there has been laid before His Excellency the Governor General in Council a report of the Acting Minister of Justice, as follows:

"1. On June 10, 1948, the Senate agreed to the following motion:

'That, in the opinion of this House, the Government should, immediately after prorogation of the present session of Parliament, refer to the Supreme Court of Canada for the opinion of that Court the question of the constitutional validity of that part of the Dairy Industry Act, Chapter 45 of the Revised Statutes of Canada, 1927, which prohibits the manufacture or sale, or having in possession for sale, or offering for sale, oleomargarine, margarine, butterine or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.'

2. The undersigned further reports that according to information furnished by the Department of Agriculture the history of margarine or oleomargarine dates back to about the year 1867 when the original formula for its manufacture was worked out by a French chemist. While the terms margarine and oleomargarine are commonly used interchangeably, there is a distinction between these products in this respect that margarine is a straight vegetable oil compound while oleomargarine contains in addition an animal fat, usually beef fat. The principal vegetable oils used are coconut, cotton-seed, peanut, soya bean and sunflower seed. None of these vegetables is produced in Canada in any considerable volume. Margarine was introduced as a food product in Europe and the United States about 1867.

3. The undersigned further reports that, according to information furnished by the Department of Agriculture, the process of manufacture is as follows:

The vegetable oil is refined and bleached and hydrogenated to the end that the melting point is controlled to meet seasonal requirements. The oil is then deodorized and a sterile, bland, neutral, flavourless oil produced which is mixed with fresh skim milk to which has been added a

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lactic acid culture, to impart a butter flavour. The mixture is then emulsified and salt and Vitamin A are added. The mixture is then tempered and again emulsified and crystallized by chilling to produce a product of uniform texture. The finished product is then moulded and wrapped for use. In the case of oleomargarine, animal fat is introduced and the process carried out as outlined.

4. The undersigned further reports that the Department of National Health and Welfare submits with its approval the following extract from an article contained in the Canadian Medical Association Journal of August, 1947, respecting margarine:

> 'One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D, for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.
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> 'Perhaps one of the main difficulties encountered with margarine in the early days of its development was that of its taste. That has now been so completely overcome that it is difficult to distinguish between butter and margarine. Even if it was making a virtue of wartime necessity, Britain found no difficulty in learning to like as well as depend on margarine during the war period.
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> 'A typical margarine today, as made in the United States, consists of 80 per cent refined vegetable oils, together with 16·5 per cent pasteurized non-fat milk for flavour, plus small amounts of glycerin derivative to prevent spattering in frying, vegetable lecithin to prevent burning and sticking to the pan, sometimes benzoate of soda as a preservative, salt and Vitamin A concentrate up to a minimum of 9,000 U.S.P. units per pound; some brands go as high as 15,000 units per pound.'

5. The undersigned has the honour further to report that in 1886 Parliament enacted "An Act to Prohibit the Manufacture and Sale of Certain Substitutes for Butter",

namely, oleomargarine, butterine or other substitute for butter, being Chapter 42 of 49 Victoria. The preamble to this Act read as follows:

> 'Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:'

This Act was reproduced as Chapter 100 of the Revised Statutes of Canada 1886, the preamble thereto being omitted as is usual in the case of such a revision.

In 1903 the Butter Act was enacted, being Chapter 6 of 3 Edward VII, which prohibited the manufacture, import or sale of oleomargarine or other substitutes for butter. This Act was incorporated into the Inspection and Sale Act, Chapter 85 of the Revised Statutes of 1906, as Part VIII thereof entitled "Dairy Products".

In 1914 the Dairy Industry Act was enacted as Chapter 7 of 4-5 George V. This repealed Part VIII of the Inspection and Sale Act and prohibited the manufacture, import or sale of oleomargarine or other butter substitutes. In the Revised Statutes of 1927, the Dairy Industry Act appears in its present form as Chapter 45 thereof.

Section 5 paragraph (*a*) of the Dairy Industry Act provides as follows:

> '5. No person shall
>
> (*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.'

6. The undersigned further reports that by Order in Council P.C. 3044 dated October 23, 1917, made under the War Measures Act the operation of Section 5(*a*) of the Dairy Industry Act was suspended and by Chapter 24 of the Statutes of Canada 1919 (2nd Session) provision was made for the manufacture and importation of oleomargarine until 31st August, 1920, and sale thereof until 1st day of March, 1921. By annual amendments the per-

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missions contained in the Oleomargarine Act were extended to August 31, 1923, in the case of manufacture and importation, and to March 1, 1924, in the case of sale.

7. The undersigned further reports that according to information furnished by the Department of Agriculture during the period December 1, 1917 to September 30, 1923, oleomargarine and butter were manufactured and imported as follows:

Oleomargarine	Manufactured lbs.	Imported lbs.	Total lbs.
Dec. 1, 1917 to Mar. 31, 1919	10,483,179	6,480,430	16,963,609
Year ended Mar. 31, 1920	6,450,902	6,497,031	12,947,933
Year ended Mar. 31, 1921	6,224,422	4,660,747	10,855,169
Year ended Mar. 31, 1922	1,902,629	1,339,748	3,242,377
Year ended Mar. 31, 1923	2,122,029	1,165,440	3,287,469
6 months ended Sept. 1923	‡1,880,678	745,015	2,625,693
Total	31,063,839	20,858,411	51,922,250

‡Manufactured covers five months ended August 1923.

Butter	Manufactured Million lbs.	Imported Million lbs.	Total Million lbs.
1918	‡193·3	0·4	193·7
1919	‡203·9	1·9	205·8
1920	215·1	0·4	215·5
1921	228·7	3·7	232·4
1922	252·5	6·0	258·5
1923	262·8	3·7	266·5
Total	1356·3	16·1	1372·4

‡Includes estimated dairy butter production of approximately 100 million pounds per year. Statistics on dairy butter production are not available for the years previous to 1920.

8. The undersigned further reports, according to information furnished by the Department of Agriculture, that milk production is an essential basic part of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces are best suited for hay and pasture crops. Consequently, milk production is the branch of agriculture which is best suited to these regions of Eastern Canada. The marginal land farmer produces much of the milk in these areas that finds its way into butter. He is able to produce milk with reasonable profit only by raising hogs and poultry which is a natural side line of the smaller farmer who keeps a few cows. Canadian

dairy products have a value of approximately $400,000,000 per annum of which the butter industry produces about $150,000,000. Approximately 50 per cent of all the milk produced in Canada goes into butter and at one time or another during the production season practically all dairy farmers depend on butter as an outlet for their surplus milk, and without this outlet their operations as milk producers would be seriously affected. Butter is the largest user of milk, of which there is produced annually in Canada approximately 17 billion pounds. Approximately 400,000 farmers are producing milk for butter manufacture and about 85 per cent of the manufacturer's price is returned to the dairy farmers. In addition to the 400,000 farmers involved, there are approximately 1,200 plants engaged in the manufacture of butter with thousands of other individuals depending for their livelihood on the butter industry.

9. The undersigned further reports that information concerning production, composition and consumption of butter and margarine in most of the important countries of the world in 1939 has been furnished to him and is contained in Schedule A hereto.

THEREFORE His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Justice, is pleased, in view of the resolution of the Senate that the opinion of the highest judicial authority in Canada be obtained with the least possible delay, to refer and doth hereby refer the following question to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 55 of the Supreme Court Act:

Question

Is Section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, Chapter 45 *ultra vires* of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

A. D. P. HEENEY,
Clerk of the Privy Council.

The respective Attorneys-General of the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and

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Saskatchewan and the Canadian Federation of Agriculture, the National Dairy Council of Canada, the Canadian Association of Consumers, the Canadian Manufacturers Association and Mr. Salter Hayden, K.C., counsel for the Honourable W. D. Euler and others were, pursuant to order of the Honourable Mr. Justice Kerwin, notified of the hearing of the Reference.

F. P. Varcoe K.C., W. R. Jackett and *A. J. MacLeod* for the Attorney-General of Canada.

L. E. Beaulieu K.C. for the Attorney-General of Quebec.

M. P. Hyndman K.C. for the Canadian Association of Consumers.

R. H. Milliken K.C. for the Canadian Federation of Agriculture.

S. A. Hayden K.C. and *J. W. Blain* for the Hon. W. D. Euler and others.

J. M. Nadeau for l'Association Canadienne des Électrices and others.

THE CHIEF JUSTICE:—His Excellency the Governor General in Council on the recommendation of the Acting Minister of Justice has been pleased, in view of the resolution of the Senate that the opinion of the highest judicial authority in Canada be obtained, to refer the following question to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 55 of the *Supreme Court Act*:—

> Is Section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, Chapter 45 *ultra vires* of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

The Order of Reference by His Excellency the Governor General in Council, dated July 27th, 1948, (P.C. 3365) first requires our attention.

The opening paragraph refers to a motion of the Senate adopted on the 10th of June, 1948. Then it proceeds to state that according to information furnished by the Department of Agriculture the history of margarine or oleomargarine dates back to about the year 1867 when the original formula for its manufacture was worked out by a French

chemist, but that while the terms margarine and oleomargarine are commonly used interchangeably, there is a distinction between these products in this respect that margarine is a straight vegetable oil compound while oleomargarine contains in addition an animal fat, usually beef fat. The principal vegetable oils used are cocoanut, cottonseed, peanut, soya bean and sunflower seed. None of these vegetables are produced in Canada in any considerable volume. Margarine was introduced as a food product in Europe and the United States about 1867.

The Order of Reference continues by saying that, according to information furnished by the Department of Agriculture, the process of manufacture is as follows:—

The vegetable oil is refined and bleached and hydrogenated to the end that the melting point is controlled to meet seasonal requirements. The oil is then deodorized and a sterile, bland, neutral, flavourless oil produced which is mixed with fresh skim milk to which has been added a lactic acid culture, to impart a butter flavour. The mixture is then emulsified and salt and Vitamin A are added. The mixture is then tempered and again emulsified and crystallized by chilling to produce a product of uniform texture. The finished product is then moulded and wrapped for use. In the case of oleomargarine, animal fat is introduced and the process carried out as outlined.

The Order of Reference goes on to say that the Department of National Health and Welfare submitted with its approval the following extract from an article contained in the Canadian Medical Association Journal of August, 1947, respecting margarine:—

> One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D, for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.
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> Perhaps one of the main difficulties encountered with margarine in the early days of its development was that of its taste. That has now been so completely overcome that it is difficult to distinguish between butter and margarine. Even if it was making a virtue of wartime necessity, Britain found no difficulty in learning to like as well as depend on margarine during the war period.

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A typical margarine today, as made in the United States, consists of 80 per cent refined vegetable oils, together with 16·5 per cent pasteurized non-fat milk for flavour, plus small amounts of glycerin derivative to prevent spattering in frying, vegetable lecithin to prevent burning and sticking to the pan, sometimes benzoate of soda as a preservative, salt and Vitamin A concentrate up to a minimum of 9,000 U.S.P. units per pound; some brands go as high as 15,000 units per pound.

According to the Order of Reference it was in 1885 that the Parliament of Canada enacted "An Act to Prohibit the Manufacture and Sale of Certain Substitutes for Butter", namely, oleomargarine, butterine or other substitute for butter, being Chapter 42 of 49 Victoria. The preamble to this Act reads as follows:—

> Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

This Act was reproduced as Chapter 100 of the Revised Statutes of Canada 1886, the preamble thereto being omitted "as is usual in the case of such a revision", so the Order of Reference states.

In 1903 the Butter Act was enacted, being Chapter 6 of 3 Edward VII, which prohibited the manufacture, import or sale of oleomargarine or other substitutes for butter. This Act was incorporated into the Inspection and Sale Act, Chapter 85 of the Revised Statutes of 1906, as Part VIII thereof entitled "Dairy Products".

In 1914 the Dairy Industry Act was enacted as Chapter 7 of 4-5 George V. This repealed Part VIII of the Inspection and Sale Act and prohibited the manufacture, import or sale of oleomargarine or other butter substitutes. In the Revised Statutes of 1927, the Dairy Industry Act appears in its present form as Chapter 45 thereof.

Section 5, paragraph (*a*), of the *Dairy Industry Act* provides as follows:—

> 5. No person shall
> (*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

By Order in Council P.C. 3044, dated October 23rd, 1917, made under the War Measures Act, the operation of Section 5(*a*) of the Dairy Industry Act was suspended

and by Chapter 24 of the Statutes of Canada 1919 (2nd Session) provision was made for the manufacture and importation of oleomargarine until 31st August, 1920, and sale thereof until the 1st day of March, 1921. By annual amendments the permissions contained in the Oleomargarine Act were extended to August 31st, 1923, in the case of manufacture and importation, and to March 1st, 1924, in the case of sale.

According to information furnished by the Department of Agriculture, during the period December 1st, 1917 to September 30th, 1923, oleomargarine was manufactured and imported to amounts totalling almost 17,000,000 lbs. from December 1, 1917 to March 31st, 1919, almost 15,000,000 lbs. for the year ending March 31st, 1920, almost 11,000,000 lbs. for the year ending March 31st, 1921, somewhat more than 3,240,000 lbs. in the year ending March 31st, 1922, slightly more than 3,280,000 lbs. for the year ending March 31st, 1923, and 2,625,693 lbs. for the six months ending September, 1923.

During the same period of time the manufacture and importation of butter appears to have been more than 193,000,000 lbs. for the year 1918, more than 205,000,000 lbs. for the year 1919, more than 215,000,000 lbs. for the year 1920, more than 232,000,000 lbs. for the year 1922, and more than 266,000,000 lbs. for the year 1923.

During the six years in question, 1918 to 1923, the importation of butter was almost negligible, amounting to only 16,000,000 lbs. 1922 was the only year in which the figures were at all worthy of consideration, the importation of butter in that year reaching 6,000,000 lbs.

The Order of Reference goes on to say that, according to information furnished by the Department of Agriculture, milk production is an essential basic part of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces, are best suited for hay and pasture crops. Consequently, milk production is the branch of agriculture which is best suited to these regions of Eastern Canada. The marginal land farmer produces much of the milk in these areas that finds its way into butter. He is able to produce milk with reasonable profit only by raising hogs and poultry, which is a natural side

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line of the smaller farmer who keeps a few cows. Canadian dairy products have a value of approximately $400,000,000 per annum, of which the butter industry produces about $150,000,000. Approximately 50 per cent of all the milk produced in Canada goes into butter, and at one time or another, during the production season, practically all dairy farmers depend on butter as an outlet for their surplus milk, and without this outlet their operations as milk producers would be seriously affected. Butter is the largest user of milk, of which there is produced annually in Canada approximately 17 billion pounds. Approximately 400,000 farmers are producing milk for butter manufacture and about 85 per cent of the manufacturer's price is returned to the dairy farmers. In addition to the 400,000 farmers involved, there are approximately 1,200 plants engaged in the manufacture of butter with thousands of other individuals depending for their livelihood on the butter industry.

Information concerning the production, composition and consumption of butter and margarine in most of the important countries of the world in 1939 is contained in Schedule A, appended to the Order of Reference. This schedule discloses the world production of margarine plus butter production in listed countries for the year 1939. In the United States more than 354,000,000 pounds of margarine were produced, in the United Kingdom more than 423,000,000 pounds, in Germany more than 815,000,000 pounds.

The countries listed in Schedule A are as follows:—

United States	Germany
Canada	Netherlands
United Kingdom	Norway
Ireland	Portugal
Belgium	Sweden
Czecho-Slovakia	Japan
Denmark	Australia
Finland	New Zealand
France	

Canada alone, of all these important countries of the world, prohibits the importation, production and consumption of margarine.

The same Schedule sets out a comparison of the food values per 100 grams between butter and oleomargarine. These values are practically the same with respect to calories, protein grams, fat grams, carbohydrate grams, phosphorous grams and iron milligrams. As regards calcium grams the table states that with respect to butter the food value, both in winter and summer, amounts to ·016 and with respect to oleomargarine ·002 and as to Vitamin A International Units it is stated that the percentage for butter in summer is 3970 and in winter 2200 and for oleomargarine it is 1980 units.

It should be noted that no mention of Vitamin D is made in Schedule A, although in the article contained in the Canadian Medical Association Journal of August, 1947, respecting margarine which forms part of the Order of Reference and which is quoted above, it is stated:—

> One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D, for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.
>
> Perhaps one of the main difficulties encountered with margarine in the early days of its development was that of its taste. That has now been so completely overcome that it is difficult to distinguish between butter and margarine...

This Court ordered that notification of the hearing of the argument upon the Reference be sent to the respective Attorneys General for the several Provinces of Canada, the Canadian Federation of Agriculture, the National Dairy Council of Canada, the Canadian Association of Consumers, the Canadian Manufacturers Association and Hon. Salter Hayden, K.C., counsel for the Hon. W. D. Euler and others.

At the hearing, in addition to the Attorney General of Canada, the Canadian Federation of Agriculture appeared in support of the validity of Section 5(*a*) of the Dairy Industry Act. Hon. Salter Hayden, K.C., representing Hon. W. D. Euler and others; Mr. L. E. Beaulieu, K.C., representing the Attorney General of Quebec, Miss M. P. Hyndman, K.C., representing The Canadian Association of Consumers, and Mr. Jean-Marie Nadeau, K.C., representing l'Association Canadienne des Électrices et autres, appeared

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in support of the contention that the subject matter of Section 5(*a*) was exclusively within provincial jurisdiction and competence and that, therefore, its insertion in the Dairy Industry Act was *ultra vires*.

It now becomes our duty to give our answer to the question referred to this Court by His Excellency the Governor General in Council.

In order to understand properly the exact purport of Section 5 (*a*) it is essential, in my opinion, to begin by an analysis of the *Dairy Industry Act,* which, it is stated in the Order of Reference, came into force in 1914 (Chapter 7 of 4-5 George V), the constitutional validity of which (except for Section 5(*a*)) has not been challenged before this Court.

Part I deals with the manufacture and sale of dairy products and butter substitutes. The Interpretation Section defines "butter", "creamery", "creamery butter", "dairy", "dairy butter", "dairy product", "fat", "foreign substance", "homogenized milk", "illegal dairy product", "oleomargarine", "package", "renovated butter" and "whey butter". The definition of oleomargarine in this Interpretation Section is as follows:—

> (*n*) "oleomargarine" means any food substance other than butter, of whatever origin, source or composition which has the appearance of and is prepared for the same uses as butter.

The next section deals with the regulations the Governor in Council may make as he deems necessary. The following paragraphs are pertinent:—

> (*c*) the seizure and confiscation of apparatus and materials used in the manufacture of any butter, cheese or other dairy product or imitations thereof in contravention of any of the provisions of this Part or of any regulation made hereunder;
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> . . . . .
>
> (*e*) the seizure and confiscation of any illegal dairy product as defined in this Part;
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> . . . . .
>
> (*g*) the imposition upon summary conviction of penalties not exceeding fifty dollars and costs upon any person violating any regulation made under the provisions of this Part;

Section 4 deals with the quality of milk for manufacturers and reads as follows:—

> 4. No person shall sell, supply or send to any cheese or butter or condensed milk or milk powder or casein manufactory, or to a milk or cream shipping station, or to a milk bottling establishment or other

premises where milk or cream is collected for sale or shipment, or to the owner or manager thereof, or to any maker of butter, cheese, condensed milk or milk powder or casein to be manufactured:

(a) milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as skim-milk, or any milk to which cream has been added, or any milk or cream to which any foreign fat, colouring matter, preservative or other chemical substance of any kind has been added;

(b) milk from which any portion of that part of the milk known as strippings has been retained;

(c) any milk taken or drawn from a cow that he knows to be diseased at the time the milk is so taken or drawn from her.

Section 5 deals with "Butter" and sub-section (*a*) of that section forms the question referred to this Court for consideration. As it has already been quoted above it is not necessary to repeat it here. It is sufficient to state that it is prohibited to manufacture, import into Canada, or offer, sell or have in one's possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

It should be noticed at once that in Section 5(*a*) oleomargarine, margarine and butterine are placed on the same footing as any other substitute for butter and that oleomargarine and margarine are characterized as being substitutes for butter.

The only other sub-section of Section 5 that need be referred to is sub-section (*e*) which states:—

5. No person shall

(*e*) have upon premises occupied by him where any dairy produce is treated, manipulated, manufactured, or re-worked, any substance that might be used for the adulteration of any such product and the presence upon any such premises of any fat or oil capable of being used for such adulteration shall be *prima facie* proof of intent so to use it.

Section 6 prohibits the importation into Canada, or the offering, selling or having in one's possession for sale (*a*) any butter containing over sixteen per centum of water, or less than eighty per centum of milk fat; or (*b*) any process or renovated butter. The other sub-sections of Section 6 deal with the character and weight of butter.

Section 7 is as follows:—

7. No person shall manufacture, import into Canada, sell, offer, or have in possession for sale, any cheese which contains any fat or oil other than that of milk or cream.

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Section 8 deals with the adulteration of cheese.

Then follow some miscellaneous provisions providing for penalties in the case of the violation of any of the provisions of Sections 4, 6 and 8 of the *Act*. In this respect Section 9 states:—

> 9. Any person, firm or corporation who violates any of the provisions of sections four, six or eight of this Act, shall for each offence, upon summary conviction, be liable to a fine not exceeding fifty dollars and not less than ten dollars, together with the costs of prosecution, and in default of payment of such penalty and costs shall be liable to imprisonment with or without hard labour, for a term not exceeding six months, unless such penalty and costs and the costs of enforcing the same are sooner paid.

Section 10, dealing with penalties in the case of violations of Sections 5 and 7, reads:—

> 10. Any person who violates any provision of sections five or seven of this Act shall be guilty of an offence and upon summary conviction, shall be liable
>
> (*a*) in the case of a first offence to a fine not exceeding one thousand dollars and not less than five hundred dollars;
>
> (*b*) in the case of a second offense to a fine not exceeding two thousand dollars and not less than one thousand dollars; in each case together with the costs of prosecution and in default of payment of such penalty and costs, to imprisonment for a term not exceeding six months with or without hard labour, unless the said penalty and costs, with costs of enforcing the same, are sooner paid;
>
> (*c*) in the case of a third or subsequent offence to imprisonment for a term not exceeding six months with or without hard labour.

This Section 10 was repealed and re-enacted by Chapter 40, 1925 S.C., in the form just quoted.

It should be noted in the case of a third or subsequent offence, imprisonment is provided for without the alternative of a fine.

Sections 11 and 12 deal with the persons liable for violating those sections of the Act relating to milk, cheese, butter or other dairy product.

There are other sections of the *Act* providing for penalties for obstructing persons enforcing the *Act*, for the appointment of inspectors and permitting them access to all places where dairy products are manufactured, or stored or dealt in, or held for transport or delivery, and for employees assisting the inspectors.

The closing sections of Part 1 of the *Act* (16 to 20 inclusive) deal with procedure, proof in deteriorated milk prosecutions, venue, evidence, establishment of guilt for

violation of the Act, summary prosecution, etc. With respect to summary prosecution it is stated:—

> In all respects not provided for in this Part, the procedure under the provisions of the Criminal Code, relating to summary convictions, shall, so far as applicable, apply to all prosecutions brought under this Part.

Part II of the *Act* deals with the grading of dairy produce. It defines "dairy produce", "grader", "inspector", "grading store", "package" and it states that the Minister to whom the administration of that Part of the Act is entrusted is the Minister of Agriculture.

The Governor in Council is authorized to make regulations not inconsistent with the *Act* and *inter alia* to provide for the establishment of standards, definitions and grades for dairy produce; and it should be remembered that the definition of "dairy produce" includes butter, cheese and other food products manufactured from milk.

Section 25 provides for penalties against any person who, not being a dairy produce grader, alters, effaces, or obliterates wholly or partially, or causes to be altered, effaced or obliterated, any dairy produce grader's brands or marks on any dairy produce which has undergone grading, or on any package containing such dairy produce.

Part III deals with the testing of glassware used in connection with milk tests and prohibits the marking of such glassware that has not been tested. The sale of glassware not marked is prohibited and so is its use. Section 30, dealing with regulations, fees and penalties reads as follows:—

> 30. The Governor in Council may make regulations for the operation and enforcement of this Part, and may, by such regulations, establish fees for the verification of the apparatus therein referred to and also provide for the imposition of penalties not exceeding fifty dollars for each offence against this Part or against any regulation made hereunder . . .

Section 1 of the Regulations made under Part I of the *Dairy Industry Act*, R.S.C. 1927, Chapter 45, and amendments thereto, deals with definitions. Sub-section (*c*) defines "butter" as "meaning the food product, commonly known as butter, manufactured exclusively from milk or cream or both, with or without colouring matter, salt or other harmless preservatives". "Cheese", "creamery", "creamery butter", "dairy", "dairy butter", "dairy product", "grader", "package", "cream cheese", "process cheese", "skim-milk cheese", "whey", "whey butter", "ice cream", "sherbet" and "milk products" are all defined.

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"Dairy product" or "dairy products" are defined as meaning "any milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream, or any other product manufactured from milk and all imitations thereof". Again the "Minister" to whom the administration of the Act is entrusted is the Minister of Agriculture.

Section 2 deals with compulsory branding. It is stated that "all brands required by these regulations to be placed on a cheese, and on a package containing cheese or butter of a net weight of more than twenty-five pounds shall be legible and indelible. . . ." Sub-section (*e*) (1) refers to the branding of cheese, creamery butter or whey butter and the packages for those articles.

Section 3 deals with prohibited branding and Section 4 with the sale of dairy products, which include butter, dairy butter,whey butter, skim-milk, cheese, creamery butter. It also refers to the branding of packages for these dairy products and provides for penalties for the infringement of the regulations concerning the sale of those products.

Sub-sections 2, 3 and 4 of Section 4 prohibit the manufacture, import into Canada, sale, offer or having in one's possession for sale ice cream, sherbet, ice cream cakes, chocolate-coated ice cream bars, ice cream moulded into special shapes or any other ice cream specialty or novelty of which ice cream is a part, or any frozen or semi-frozen milk product, unless the product conforms with the specifications therein mentioned. There are also elaborate provisions concerning ice cream and sherbet and for the containers or cabinets used for their storage.

Section 6 of the Regulations deals with the seizure and confiscation of apparatus or materials used or intended to be used in the manufacture of any butter, cheese, or other dairy product or imitation thereof in contravention of any of the provisions of the Act or of any regulations made thereunder. It also refers to the disposal of seized products and provides for the keeping of record books and registers.

Then follow Schedule No. 1 and Schedule No. 2. The former is a form for "application for registration of a cheese factory, a creamery, a combined factory or a factory where cheese is processed or butter is re-worked", and Schedule No. 2 illustrates the form and size of type number on a cheese, and on packages containing cheese or butter of a net weight of more than twenty-five pounds.

Regulations under Part II of the *Act* deal with cheddar cheese and creamery butter of Canadian origin intended for export. It refers to standards for grades of cheese, these standards being divided into first, second and third grade cheese and below third grade cheese. There are also standards for grading washed curd cheese and for grades of creamery butter.

There are also regulations under Part III of the *Act* dealing with the duty of verifying the glassware which comes under the provisions of that Part and which is assigned to the Weights and Measures Standards Branch, Department of Trade and Commerce, Ottawa.

In my opinion, it follows, from the analysis just made of the *Dairy Industry Act,* that, in addition to being legislation under Section 95 of the *British North America Act* dealing with agriculture, so far as it relates to that subject matter, the *Act* has effect, notwithstanding any law of the legislature of a Province relating to agriculture which may be repugnant to it. It also falls within the ambit of Head 27 of Section 91 of the *British North America Act* extending to "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters", because it meets the definition as stated in the decision of the Judicial Committee of the Privy Council in *Proprietary Articles Trade Association et al* v. *Attorney-General for Canada et al* (1). Section 5(*a*) of the *Dairy Industry Act* deals truly with "acts prohibited with penal consequences" and it cannot be contended that it is colourable legislation on the part of Parliament. My brother Kerwin has satisfactorily dealt with this point in his answer to the question submitted in the Order of Reference. I agree with what he has said and do not find it necessary to add anything further on that point.

But I wish to state also that, to my mind, Section 5(*a*) of the Act can be supported in favour of the Dominion's contention both on the grounds that it is Agriculture (Section 95 of the B.N.A.A.) and Head 2 of Section 91 of the same Act (B.N.A.A.), the Regulation of Trade and Commerce.

It was not contended at bar—and I think it could hardly be contended—that the Dairy Industry Act and regulations thereunder are not within the domain of the federal parlia-

(1) [1931] A.C. 310 at 324 and 325.

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ment by force of Section 95 of our constitution. It is a law in relation to agriculture which the Parliament of Canada from time to time is empowered to make in relation to agriculture, and it is not within the competence of the respective provincial legislatures to enact legislation in this regard when Parliament has already covered the field, in view of the following words of Section 95:—

> and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

That point of view cannot be discarded on the ground that oleomargarine or margarine are supposedly articles of trade, or commodities which are not directly the product of agriculture. In support of that suggestion a passage in the judgment of Mignault J. in *The King* v. *Eastern Terminal Elevator Co.* (1) was largely relied on. In that passage Mignault J. said:—

> I have not overlooked the appellant's contention that the statute can be supported under section 95 of the British North America Act as being legislation concerning agriculture. It suffices to answer that the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products. What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide a meaning may be given to the latter term.

It should be noted that the passage just quoted was only the expression of one judge, about which the majority of the Court said absolutely nothing. The judgment of this Court did not in any way uphold that view and it ought to be taken as a mere *obiter* which cannot stand as a judgment of this Court. To the appellant's contention that the statute could be supported under Section 95 of the *British North America Act* as being legislation concerning agriculture, Mignault J. cursorily said: "It suffices to answer that the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade." And he added:—

> The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products. What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide a meaning may be given to the latter term.

(1) [1925] S.C.R. 434 at 457.

I shall deal later with the contention that the legislation under consideration in this Reference can be regarded as a regulation of trade and commerce, but I think it proper to observe at this point that we cannot rest our answer to the question in the Order of Reference on the above passage from a judgment of one member of this Court, not concurred in by the majority who delivered judgment, and which has all the characteristics of a mere *obiter* and which I consider was quite unnecessary for the purpose of the judgment of the learned judge in that particular case.

I cannot agree, therefore, with the argument that the constitutional validity of the *Dairy Industry Act* is not supported under Section 95 of the *British North America Act*. Indeed, if Parliament does not derive its authority from Section 95 to pass such an *Act*, I am at a loss to perceive upon what other Head of Section 91 it could be held to have been competently adopted. I repeat, that it was in no way challenged in the course of the argument before the Court. In these circumstances the insertion of Section 5(*a*) of the *Dairy Industry Act*, dealing with the "manufacture, import into Canada, or offer for sale or have in one's possession for sale, oleomargarine, margarine, butterine, or *other substitute for butter, manufactured* wholly or in part from any fat other than that of milk or cream", being an insertion in the *Dairy Industry Act* and adopted by Parliament by virtue of its power to deal with "laws in relation to agriculture in the provinces", is, in my opinion, nothing more than the direct exercise of Parliament's jurisdiction over agricultural matters, or at least necessarily incidental and necessary for the effective control of agricultural matters in respect of milk and its by-products.

It should be observed that the *Dairy Industry Act*, as I have illustrated in the opening paragraphs of this judgment, deals not only with milk, but also with butter, several varieties of cheese, ice cream, sherbet, etc., all coming within the special definition contained in the *Act* of "dairy product", or "dairy products", or "dairy produce", and, according to the definition, meaning "any milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream or any other article *manufactured* from milk and all imitations thereof". It seems, in my

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opinion, impossible to distinguish oleomargarine or margarine from any of these other articles included in the definition of dairy products, particularly when, as set out in Section 5(*a*), they are likened to "butterine, or other substitute for butter".

The fact that oleomargarine and margarine do not come directly from the cows (of course they do not) and the mere contention that they are not natural products but rather manufactured articles is not sufficient to remove them from the domain of the federal government in respect of agriculture. If this argument were sound, the same thing could be said with as much force about butter, cheese, ice cream, or, in the words of the definition of "dairy product" in the Act, "any other article manufactured from milk and all imitations thereof". From that point of view oleomargarine and margarine are strictly on a par with these commodities just mentioned; and, if the manufacture of butter, cheese, ice cream, or any other commodity manufactured from milk and all imitations thereof are properly regulated and, in many cases, prohibited by force of the *Dairy Industry Act,* it does not seem possible to say that oleomargarine and margarine cannot be competently dealt with by Parilament under the provisions of that *Act* on the mere pretense that they are "manufactured articles". They are just as much a dairy product as butter, cheese, ice cream, or other articles *"manufactured"* from milk. They are, therefore, proper subject matters of an Act adopted by Parliament in virtue of its powers under Section 95 of the *British North America* Act and Section 5(*a*) was competently inserted in the *Dairy Industry Act,* just as much as all the other sections of the Act dealing with butter, cheese, ice cream, or other commodities manufactured from milk. In fact, the definition of "dairy product", or "dairy produce" in Section 2 of Part I of the *Act* indicates conclusively that Parliament intended to include as a dairy product articles manufactured from milk and, if oleomargarine and margarine had not been specifically mentioned in the Act, they would come under the definition as being "any other article manufactured from milk".

For these reasons I would answer the question put to the Court in the Order of Reference by declaring that Section 5(*a*) of the *Dairy Industry Act,* R.S.C. 1927, chapter 45, is *intra vires* the Parliament of Canada in whole on the ground that it has constitutional validity as a proper exercise of the powers of Parliament by virtue of Section 95 of the *British North America Act.*

But there is yet another reason for stating that the validity of Section 5(*a*) must be upheld. By Head 2 of Section 91 of the *British North America Act* the regulation of trade and commerce has been entrusted to Parliament. It has not been disputed that the legislation submitted to us deals with trade and commerce. Indeed the contention of those who pretend that Section 5(*a*) is invalid from a constitutional point of view, as not being within the proper domain of the federal parliament, is that it cannot be regarded as coming within Section 95, dealing with agriculture, for the reason, they say, that oleomargarine and margarine are not products of agriculture but that they are "articles of trade". Following this contention to its necessary consequence, they say that it cannot come under federal jurisdiction because then it would be regulation of a particular trade and, as a result of numerous decisions of the Judicial Committee of the Privy Council, it does not come within Head 2 of Section 91 of the *British North America Act,* and the decision of the Judicial Committee in *Citizens Insurance Co. of Canada* v. *Parsons* (1) was cited, where Sir Montague Smith, delivering the judgment of the Board, said:—

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and *it may be* that they would include general regulations of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sec. 92.

(1) (1881-82) 7 A.C. 96 at 113.

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Subsequent pronouncements of the Judicial Committee on the same subject were summarized by Sir Lyman Duff, C.J.C., in *The Natural Products Reference* (1):—

> It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

It is scarcely necessary to add that Chief Justice Duff's views were commended by the Judicial Committee in the words of Lord Atkin: (2)

> The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point, and preclude further disputes.

I should like to point out, however, that the *Dairy Industry Act* does not deal with a particular trade, or with a particular commodity. We have seen that it deals with milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream or any other article manufactured from milk and all imitations thereof; and Part II of the *Act* deals with the grading of dairy produce, grading store, the powers of the Governor in Council to make regulations for the establishment of standards, definitions and grades for dairy produce and for the maturing, storing, packaging, handling and transporting of dairy produce. Then Part III deals with the testing of glassware used in connection with milk tests.

The regulations, which have not been attacked, define butter as "the food product, commonly known as butter, *manufactured* exclusively from milk or cream or both, with or without colouring matter, salt or other harmless preservatives". Cheese is defined as "the product made from curd obtained from milk, skim-milk, cream or any mixture of these by coagulating the casein thereof with rennet, lactic acid or any suitable enzyme or acid, and with or without further processing or the addition of other wholesome ingredients, such as fresh milk solids, ripening, ferments, special moulds, emulsifying agents, seasoning or colouring matter, and may not contain any preservative other than salt (sodium chloride)". "Dairy product" is

(1) [1936] S.C.R. 398 at 410. (2) [1937] A.C. 326 at 353.

defined as "any milk, cream, condensed milk, evaporated milk, milk powder, butter, cheese, ice cream, or any other product *manufactured* from milk and all imitations thereof". Then the regulations deal with whey, whey cream, whey butter, ice cream, sherbet and, in fact, all milk products.

Reference has already been made to the fact that the regulations deal with compulsory branding, prohibited branding, the sale of dairy products, and that "every person who manufactures or intends to manufacture cheese, creamery butter or whey butter, or processes, or intends to process cheese, or reworks or intends to rework butter, shall register with and obtain a certificate of registration with a registration number from the Department, Ottawa, for each such factory owned or operated by him".

Regulations under Part II as I have mentioned above, divides cheese into first, second, third grade and below third grade cheese and contains elaborate provisions for the scores and definitions for grades of butter.

Regulations under Part III provide for the verification of glassware and it is stated:—

> 34. All test bottles and pipettes used in connection with the testing of milk or cream, except skim-milk bottles and the tubes used in connection with the apparatus known as the "Oil Test Churn" shall be forwarded, charges prepaid, to the Weights and Measures Standards Branch, Department of Trade and Commerce, Ottawa, Canada, for the purpose of verification.

Clearly such an Act is not limited to the regulation of one particular trade or of one particular commodity, nor to one, or more than one province; it is an Act embracing the whole Dominion.

It was also argued that the power to regulate under Head 2 of Section 91 does not mean the power to prohibit, that prohibition is not regulation, that, in fact, from the moment you prohibit you exclude regulation. In my opinion such a contention cannot be supported. In the process of regulating these different commodities, or the trading in these different commodities, the *Dairy Industry Act* prescribes extensive regulations, in the course of which certain prohibitions are included. It stands to reason that, if you regulate, you may prohibit things that are not in accordance with those regulations. Section 5(*a*) deals with "the manufacture, import into Canada, or offer, sale or having in one's possession for sale, any oleomargarine, mar-

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garine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream" and it does not amount to absolute prohibition. In the precise words of the Section it prohibits only those commodities which are "manufactured wholly or in part from any fat other than that of milk or cream". Therefore, it is unnecessary to reiterate that the effect of the section is that no person shall "manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream". The prohibitions which flow from this Section 5(*a*) are enumerated in the sub-sections that follow, i.e., (*b*), (*c*), (*d*) and (*e*). For instance, sub-section (*b*) provides that:—

> 5. (*b*) No person shall mix with or incorporate with butter, by any process of heating, soaking, rechurning, reworking, or otherwise, any cream, milk, skim-milk, butter-milk or water to cause such butter when so treated to contain over sixteen per centum of water or less than eighty per centum of milk fat.

The particular "mixing" or "processing" is prohibited but butter itself is not prohibited.

Sub-sections 5 (*c*), (*d*) and (*e*) read as follows:—

> 5. No person shall
>
> (*c*) melt, clarify, refine, rechurn, or otherwise treat butter to produce "process" or "renovated" butter;
>
> (*d*) manufacture, import into Canada, or sell, offer, expose or have in possession for sale, any milk or cream or substitute therefor which contains any fat or oil other than that of milk;
>
> (*e*) have upon premises occupied by him where any dairy produce is treated, manipulated, manufactured, or reworked, any substance that might be used for the adulteration of any such product and the presence upon any such premises of any fat or oil capable of being used for such adulteration shall be *prima facie* proof of intent so to use it.

It can be seen very clearly that the whole of Section 5 does not prohibit the dairy product therein mentioned; it only prohibits certain methods of manufacturing it and, if one considers all the sections of the *Dairy Industry Act,* it is apparent that oleomargarine and margarine are treated exactly on a par with all the other products. To illustrate what I have just said it is only necessary to refer to sub-section (2) of Section 4 of the regulations made under Part I of the *Act,* dealing with ice cream and sherbert. In that sub-section certain kinds of ice cream and sherbet which

do not come up to the standards therein prescribed are prohibited, but no one would contend that that is prohibition within the meaning of Head 2 of Section 91 of the *British North America Act*. It is very proper regulation prohibiting "the manufacture, import into Canada, sale, offer or having in one's possession for sale" ice cream or sherbet which do not come up to standards established by the regulations and, at the same time, allowing the manufacture, import into Canada and sale of ice cream or sherbet which come up to the established standards.

My conclusion is, therefore, that the so-called prohibition in Section 5(*a*) is not prohibition at all, but a regulation of trade and commerce and properly within the competence of Parliament in virtue of Head 2 of Section 91 of the *British North America Act*. In my opinion, when that Section 5(*a*) is read in conjunction with the whole of the *Act*, there is no real prohibition. It is truly a "regulation of trade and commerce"; or that Section 5(*a*) is only a necessary incidental part of an Act which Parliament had full power to adopt by virtue of Section 95 of the *British North America Act* and, moreover, in view of the form given to it, it also comes within Head 27 of Section 91 (Criminal Law).

Of course, it may be said that the whole Act is unquestionably of national interest and importance and that the legislation as originally enacted was for the purpose of safeguarding the whole of the public generally. In this regard I think it proper to quote a passage from the decision of the Judicial Committee of the Privy Council, *Attorney General for Ontario* v. *Canada Temperance Federation* (1), where Viscount Simon said:—

> It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances . . . Their Lordships do not find it necessary to consider the true effect either of s. 5 or s. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was *ultra vires*.

It was stated that the purpose of the *Dairy Industry Act* was to give trade protection to the dairy industry in the

(1) [1946] A.C. 193 at 207.

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production and sale of butter as against substitutes. In this connection the Order of Reference specifically stated (sec. 8):—

> Milk production is an essential basic part of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces are best suited for hay and pasture crops. Consequently, milk production is the branch of agriculture which is best suited to these regions of Eastern Canada. The marginal land farmer produces much of the milk in these areas that finds its way into butter. He is able to produce milk with reasonable profit only by raising hogs and poultry which is a natural side line of the smaller farmer who keeps a few cows. Canadian dairy products have a value of approximately $400,000,000 per annum of which the butter industry produces about $150,000,000. Approximately 50 per cent of all the milk produced in Canada goes into butter and at one time or another during the production season practically all dairy farmers depend on butter as an outlet for their surplus milk, and without this outlet their operations as milk producers would be seriously affected. Butter is the largest user of milk, of which there is produced annually in Canada approximately 17 billion pounds. Approximately 400,000 farmers are producing milk for butter manufacture and about 85 per cent of the manufacturer's price is returned to the dairy farmers. In addition to the 400,000 farmers involved, there are approximately 1,200 plants engaged in the manufacture of butter with thousands of other individuals depending for their livelihood on the butter industry.

It would seem to me that the manufacture, import or sale of oleomargarine or margarine, or other substitutes for butter, manufactured wholly or in part from any fat other than that of milk or cream, if thought injurious to the manufacture and sale of butter which concerns such a large and important section of Canada, can hardly be said not to be of national concern. That consideration, however, goes only to the motive of Parliament in dealing with this matter by legislation. It is possible that Parliament could invoke the opening part of Section 91 as a sufficient reason for dealing with this matter in the way it has been dealt with in Section 5(*a*) of the *Dairy Industry Act*. But, in addition, it emphasizes very clearly the fact that such a situation does come under Head 2 of Section 91, the regulation of trade and commerce, and also under section 95, agriculture.

I need hardly add that whatever may be said of the local manufacture or sale of oleomargarine and margarine, no question can be raised as to the competence of Parliament to deal with the "import into Canada". That is, of course, essentially a matter within the competence of Parliament, as also would be the interprovincial trade in those com-

modities. The argument of those who opposed the constitutional jurisdiction of Parliament with regard to Section 5(*a*) was limited to Parliament's power to deal with local manufacture or sale within each province; and, in my opinion, even in this respect Section 5(*a*) was competently enacted by Parliament.

My answer to the question submitted in the Order of Reference is, therefore, that Section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, is not *ultra vires* the Parliament of Canada in whole or in part.

KERWIN J.: Section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, with which we are concerned, reads as follows:—

> 5. No person shall
>
> (*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream;

The Order of reference explains that while the terms margarine and oleomargarine are commonly used interchangeably, margarine is a straight vegetable oil compound and oleomargarine contains in addition an animal fat, usually beef fat. It also gives us the process of manufacture as follows:—

> The vegetable oil is refined and bleached and hydrogenated to the end that the melting point is controlled to meet seasonal requirements. The oil is then deodorized and a sterile, bland, neutral, flavourless oil produced which is mixed with fresh skim milk to which has been added a lactic acid culture, to impart a butter flavour. The mixture is then emulsified and salt and Vitamin A are added. The mixture is then tempered and again emulsified and crystallized by chilling to produce a product of uniform texture. The finished product is then moulded and wrapped for use. In the case of oleomargarine, animal fat is introduced and the process carried out as outlined.

With these definitions and explanations in mind we might now turn to the history of the legislation.

By chapter 42 of the Statutes of 1886, Parliament enacted "An Act to prohibit the Manufacture and Sale of certain substitutes for Butter". After this recital:—

> WHEREAS the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof:

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the only section of the Act provides:—

1. No oleomargarine, butterine or other substitute for butter, manufactured from any animal substance other than milk, shall be manufactured in Canada, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.

This Act was reproduced as chapter 100 of the Revised Statutes of Canada, 1866, without the preamble. In 1903, The Butter Act was enacted by chapter 6 of 3 Edward VII and section 5 provided:—

5. No person shall manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

Section 10 provided for a fine of not less than two hundred dollars and not more than four hundred dollars for every one convicted of a violation of this provision, together with the costs of prosecution, and in default of payment of such fine and costs such person was liable to imprisonment with or without hard labour for a term not exceeding three months. In the Revised Statutes of 1906, these provisions were incorporated in Part VIII of chapter 85, the Inspection and Sale Act, as sections 298 and 309.

By chapter 7 of the Statutes of 1914, Part VIII of the Inspection and Sale Act was repealed. Section 5 provided:—

5. No person shall

(a) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.

Here, for the first time, margarine was mentioned as well as oleomargarine. By section 10, the penalty was the same as that previously provided, except that the possible term of imprisonment for non-payment of the fine or costs was made six months.

In the Revised Statutes of 1927, the *Dairy Industry Act* appears in its present form as chapter 45 and section 5(a) has been inserted in Part I thereof. In the same Part are other provisions as to procedure and evidence in

any complaint or information relating to the sale or supply of milk, and subsection 4 of section 19 enacts:—

> In all respects not provided for in this Part, the procedure under the provisions of the Criminal Code, relating to summary convictions, shall, so far as applicable, apply to all prosecutions brought under this Part.

Subsection 1 of section 20, also in Part I, provides for the application of fines imposed under the foregoing sections of the Act relating to the sale or supply of milk and subsection 2 enacts:—

> 2. Any pecuniary penalty imposed under any of the other sections of this Part shall, when recovered, be payable one-half to the informant or complainant, and the other half to His Majesty.

We were told that margarine was introduced as a food product in Europe and the United States about 1867 and it is stated that the principal vegetable oils used are coconut, cotton-seed, peanut, soy bean and sun-flower seed, none of which is produced in Canada in any considerable value. By Order in Council P.C. 3044, dated October 23rd, 1917, made under the War Measures Act, the operation of section 5(*a*) of the *Dairy Industry Act* (which was then chapter 7 of the 1914 Statutes) was suspended and by chapter 34 of the 1919 (second session) Statutes provision was made for the manufacture and importation of oleomargarine until October 31st, 1920, and the sale thereof until March 1st, 1921. By annual amendments, these permissions were extended to August 31st, 1923, in the case of manufacture and importation, and to March 1st, 1924, in the case of sale.

In addition to these relaxations, the Department of National Health and Welfare now approves a statement contained in the Canadian Medical Association Journal of August, 1947, that "as a source of energy, margarine and butter are exactly equal". During the years when by order in council and statute the manufacture and importation of oleomargarine was permitted, the annual total, in both categories, never exceeded 17,000,000 pounds. The total quantity of butter imported and manufactured in Canada during the same period varied from approximately 193,000,000 pounds to about 226,000,000 pounds per year.

In the Order of reference, the Acting Minister of Justice also reported: Milk production is an essential basic part

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of agriculture as certain large areas of Canada, particularly in Ontario and Quebec and the Maritime Provinces are best suited for hay and pasture crops. Approximately 400,000 farmers are producing milk for butter manufacture, in addition to which there are about 1,200 plants engaged in the manufacture of butter while thousands of other individuals depend for their livelihood on the butter industry.

The power of Parliament to enact the prohibition contained in section 5(*a*) of the *Dairy Industry Act* was rested by counsel for the Dominion upon several provisions of the *British North America Act,* to only one of which it is necessary to refer: head 27 of section 91, "Criminal Law". It may be granted that, although Parliament alone could deal with the importation into Canada of oleomargarine or margarine, it could not necessarily assume authority to regulate a particular trade in a province. However, if it be found in any particular case that Parliament is not using the cloak of "Criminal Law" to cover a foray into the regulation of a particular local trade, the matter is settled by the decision of the Judicial Committee in Proprietary Trade Association v. Attorney General of Canada (1), followed in In the matter of a Reference re section 498 of the Criminal Code (2). Adopting the principle set forth in these decisions, there is no ground on which it may be held that the legislation here in question, on its true construction, is not what it professes to be, that is, an enactment creating a criminal offence in exercise of the powers vested in Parliament in virtue of the 27th head of section 91 of the *British North America Act.*

It was argued that the approval by the Department of National Health and Welfare of the statement in the Canadian Medical Association Journal shows that the recital in the original Act of 1886 no longer states correctly the present position of margarine or oleomargarine. Granting this to be so and presuming that, by force of the several Acts dealing with the various revisions of the Dominion statutes, the recital is no longer in force, other reasons may have influenced Parliament in enacting the other Acts set

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

(2) [1936] S.C.R. 363; [1937] A.C. 368.

out in the legislative history above, including the section before us. That consideration was considered sufficient in Attorney General for Ontario v. Canada Temperance Federation (1). The actual decision in that case is not of assistance on the particular point we are now at but once it be concluded that this is true criminal legislation, the Privy Council decision does show that the incorrectness of the recital in the original statute has no bearing.

My answer to the question is that section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, chapter 45, is not ultra vires the Parliament of Canada either in whole or in part.

TASCHEREAU, J.—Par arrêté ministériel en date du 27 juillet 1948, il a plu à Son Excellence le Gouverneur général en Conseil de soumettre à cette Cour la question suivante:

L'article 5 (*a*) de la Loi concernant l'Industrie Laitière (S.R.C. 1927, chap. 45) est-il ultra vires des pouvoirs du Parlement du Canada, en tout ou en partie, et dans l'affirmative de quelle façon, et jusqu'à quel point?

Cet article qui fait l'objet de la présente soumission ce lit ainsi:

Nul ne peut:—

fabriquer, importer au Canada, ou offrir, vendre ou avoir en sa possession pour la vente, de l'oléomargarine, de la margarine ou autres beurres artificiels ou succédanés du beurre, provenant en tout ou en partie de matière grasse autre que celle du lait ou de la crème.

L'origine de cet article remonte à 1886 alors que le Parlement du Canada adopta la loi 49 Victoria, chap. 42, intitulée "LOI À L'EFFET DE PROHIBER LA FABRICATION ET VENTE DE CERTAINS SUBSTITUTS DU BEURRE", et dont le préambule se lisait ainsi:

Considérant que l'usage de certains substituts du beurre, ci-devant fabriqués et mis en vente en Canada, *est nuisible à la santé*, et qu'il est à propos d'en interdire la fabrication et la vente: A ces causes, Sa Majesté, par et avec l'avis et le consentement du Sénat et de la Chambre des communes du Canada décrète ce qui suit:

La loi elle-même était rédigée dans les termes suivants:

1. Nulle oléomargarine, butterine ou autre matière substituée au beurre, fabriquée avec toute substance animale autre que le lait, ne sera fabriquée en Canada ou n'y sera vendue; et quiconque enfreindra les dispositions du présent acte en quelque manière que ce soit encourra une amende n'excédant pas quatre cents piastres, ni de moins de deux cents piastres, et à défaut de paiement sera passible d'emprisonnement pendant douze mois au plus et trois mois au moins.

(1) [1946] A C. 193.

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Lors de la révision des statuts fédéraux en 1886, cette loi y fut incorporée au chap. 100, mais amputée de son préambule qui, comme nous l'avons vu, était à l'effet que certains substituts du beurre étaient *nuisibles à la santé.* Il est bon de remarquer que la prohibition s'applique seulement à la manufacture et à la vente des substituts du beurre et non pas à leur importation, et de souligner également que ce n'est que plus tard qu'il sera spécifiquement question de margarine. La différence qui existe entre les deux produits, mais qui n'est pas importante pour les fins de la présente soumission, est que la margarine est un produit d'huile végétale tandis que l'oléomargarine contient, en outre, un gras animal.

En 1903, le Parlement du Canada adopta une loi intitulée "LOI PROHIBANT L'IMPORTATION, LA FABRICATION ET LA VENTE DU BEURRE FALSIFIÉ, DU BEURRE REFAIT, DE L'OLÉOMARGARINE, DE LA 'BUTTERINE' OU AUTRE PRÉTENDU SUCCÉDANÉ DU BEURRE, ET À L'EFFET DE PRÉVENIR LE MARQUAGE FRAUDULEUX DE CE DERNIER PRODUIT". L'article 5 de cette loi était ainsi conçu:

> Personne ne fabriquera, n'importera en Canada, ne tiendra, ne vendra ou n'aura en sa possession pour la vente, de l'oléomargarine, de la butterine ou autre prétendu succédané du beurre, fabriqués en tout ou en partie avec des matières grasses autres que celle du lait ou de la crème.

Cette loi a été incorporée à la "LOI CONCERNANT L'INSPECTION ET LA VENTE DE CERTAINES DENRÉES ET AUTRES PRODUITS" au chap. 85 des Statuts Revisés de 1906 et en constituait la partie 8, qui avait pour titre "PRODUITS DE LA LAITERIE". L'article 5 cité plus haut devint l'article 298 de cette loi.

En 1914, la partie 8 de la "LOI CONCERNANT L'INSPECTION ET LA VENTE" a été rappelée et la "LOI DE L'INDUSTRIE LAITIÈRE" a été adoptée et devint le chap. 7 de 4-5 Geo. V. La prohibition mentionnait spécialement la margarine, et la "LOI DE L'INDUSTRIE LAITIÈRE" se trouve maintenant dans les Statuts Revisés du Canada, 1927, chap. 45. C'est l'article 5 de cette loi qui fait l'objet du présent litige.

L'arrêté ministériel qui autorise la référence à cette Cour explique le procédé de manufacture de la margarine,

de l'oléomargarine, et les différences qui existent entre les deux produits. Il fait voir également comment on a réussi à faire disparaître le goût désagréable de ces produits et de quelle façon on a réussi à remédier au manque de vitamine "A" dans les huiles végétales, de telle façon que le beurre et la margarine ont maintenant une égale source d'énergie. Il est aussi mentionné dans cet arrêté ministériel que depuis le 1er septembre 1917, au 30 mars 1923, quand l'opération de l'article 5 *a*) de la "LOI DE L'INDUSTRIE LAITIÈRE" fut suspendue en vertu de la Loi des Mesures de Guerre, de grandes quantités d'oléomargarine ont été manufacturées et importées au Canada, et que la consommation de l'oléomargarine atteint actuellement un chiffre très élevé dans plusieurs pays du monde, dont les États-Unis d'Amérique et la Grande-Bretagne. Il est de plus révélé aux exhibits qui ont été produits, que la plupart des pays du monde manufacturent la margarine et l'oléomargarine, que la vente en est permise, et la Cour a même été informée qu'au cours de la première et de la deuxième grandes guerres, les soldats canadiens en faisaient un usage quotidien.

Le Procureur Général du Canada, appuyé par la Fédération Canadienne d'Agriculture, soutient que cet article 5(*a*) de la "LOI DES PRODUITS LAITIERS", n'est pas du domaine provincial, mais relève du Parlement du Canada, qui seul a le pouvoir de faire des lois "pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par le présent Acte exclusivement assignés aux Législatures des provinces." Il soutient également que la législation est valide parce qu'elle se rapporte au droit criminel, à l'agriculture, qu'elle règlemente le commerce, domaines qui, en vertu de l'article 91 de l'Acte de l'Amérique Britannique du Nord, sont de la compétence du Parlement Fédéral.

Le Procureur Général de la province de Québec, l'honorable W. D. Euler, l'Association Canadienne des Électrices et l'Association Canadienne des Consommateurs, prétendent au contraire que cette question relève exclusivement des provinces qui, en vertu de l'article 92 de l'Acte de l'Amé-

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rique Britannique du Nord, para. 13, ont seules le droit de légiférer sur "la propriété et les droits civils dans la province", et en vertu de la section 16, sur toutes les matières d'une "nature purement locale ou privée dans la province".

Il me semble indiscutable que la manufacture, la possession ou la vente de la margarine et de l'oléomargarine, sont l'exercice de droits civils bien définis, et dont la réglementation a été laissée aux provinces par les Pères de la Confédération. Il ne fait pas de doute non plus que les mots "propriété et droits civils" doivent être employés dans leur sens le plus large, et comprennent dans leur sens ordinaire certainement le mot "contrat", qui est un acte d'une nature essentiellement civile. (*Citizens Insurance v. Parsons* (1); *Natural Products Marketing Act* (2).

Mais si "les droits civils et la propriété" sont du ressort provincial, il est maintenant établi qu'il peut arriver parfois que l'autorité fédérale devienne compétente pour légiférer sur ce qui normalement n'est pas de son domaine. Des cas en effet se présentent où, par suite de l'existence de certaines conditions, et à cause des dimensions qu'elles prennent et des proportions nationales qu'elles atteignent, certaines matières deviennent du ressort du Parlement Fédéral. Alors, la question cesse d'être d'une nature "purement locale ou privée dans la province", et la juridiction provinciale qui alors était absolue cède la place au contrôle fédéral, qui légifère alors pour "la paix, l'ordre et le bon gouvernement du Canada".

Une abondante jurisprudence ne permet plus d'entretenir de doute à ce sujet. Déjà en 1896, dans *Attorney-General for Ontario v. Attorney-General for the Dominion of Canada* (3), Lord Watson émettait le principe suivant:—

> 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 justify the Canadian Parliament in passing laws for their regulation and abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within jurisdiction of the provincial legislatures and that which has ceased to be merely local and provincial and has become a matter of national concern.

(1) (1881-82) 7 A.C. 96 at 109.
(2) [1936] S.C.R. 398 at 416.
(3) [1896] A.C. 348 at 361.

Dans *Attorney-General for Canada v. Attorney-General for British Columbia* (1) Lord Tomlin confirmait ce qu'avait antérieurement dit Lord Watson:—

> 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 trench 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: See *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896) A.C. 348.

Ces expressions d'opinions ont été maintes fois confirmées par le Comité Judiciaire du Conseil Privé, et on a même précisé davantage quelle était la nature de l'urgence requise pour justifier l'intervention du Parlement Fédéral. Mais ce n'est pas dans tous les cas où l'intérêt national est en jeu qu'il peut le faire. Ainsi, le Comité Judiciaire du Conseil Privé dans *The Board of Commerce* case (2), emploie les expressions "under necessity in highly exceptional circumstances;" dans *Fort Frances Pulp & Power Co. v. Manitoba Free Press* (3) on se sert des mots "sudden danger to social order", "in the event of war when the national life may require . . . very exceptional means;" dans *Toronto Electric Commissioners v. Snider* (4) on exige: "some extraordinary peril to the national life of Canada", "epidemic of pestilence"; dans *The Regulation and Control of Aeronautics in Canada* (5), on confirme les expressions employées dans certaines des causes ci-dessus. En 1937, dans *Attorney-General for Canada v. Attorney-General for Ontario* (6), Lord Atkin réaffirme encore les principes ci-dessus mentionnés, et emploie en les confirmant de nouveau les expressions suivantes: "abnormal circumstances", "exceptional conditions", "standard of necessity", "some extraordinary peril to the national life of Canada", "highly exceptional", "epidemic of pestilence". Ce sont là des cas où la distribution normale des pouvoirs accordés aux provinces en vertu de l'article 92 peut être mise de côté afin de permettre au Parlement Fédéral de légiférer. Dans ce

(1) [1930] A.C. 111 at 118.
(2) (1922) 1 A.C. 191 at 197.
(3) [1923] A.C. 695 at 703.
(4) [1925] A.C. 396 at 412.
(5) [1932] A.C. 54 at 72.
(6) [1937] A.C. 326 at 353.

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jugement, Lord Atkin approuve le jugement de Sir Lyman Duff, ancien juge en chef de cette cour (*The Natural Products Marketing Act* (1), où il a défini dans quels cas le pouvoir fédéral pouvait se substituer à l'autorité provinciale, et légiférer sur des matières ordinairement dévolues aux provinces. Lord Atkin dit que le jugement du Juge en chef forme le "locus classicus" de la loi et ferme la porte à toute autre discussion.

Le Procureur Général du Canada a soumis que le présent conflit doit être réglé par l'ancienne décision du Conseil Privé de *Russell* v. *La Reine* (2) rendue en 1882. Cet arrêt que l'on a souvent invoqué depuis au delà d'un demi-siècle n'a pas, il me semble, la signification qu'on a voulu lui donner, en s'appuyant sur les commentaires de Lord Haldane dans *Toronto Electric Commissioners* v. *Snider* (3). Appelé à interpréter cette dernière décision dans une cause récente de *Attorney-General for Ontario* v. *Canada Temperance Federation* (4) Lord Simon a définitivement précisé que le Conseil Privé en 1882, n'a jamais rendu son jugement en se basant sur le fait qu'il y avait *une urgence* qui justifiait le Parlement Fédéral de légiférer sur une matière qui ordinairement aurait été de la compétence provinciale. Le "ratio decidendi" du Conseil Privé a été qu'il s'agissait en l'occurrence de "Temperance", qui était du ressort fédéral et nullement de "propriété et de droits civils". Le Scott Act a été jugé une loi permanente et non pas temporaire. Ce n'est pas l'existence de certaines conditions anormales et passagères qui en ont justifié la validité.

Cette jurisprudence démontre clairement que ce n'est que dans des cas *très exceptionnels* que le Parlement Fédéral acquiert l'autorité nécessaire pour adopter des lois qui sont normalement du ressort provincial. Et il est très heureux qu'il en soit ainsi, car autrement les droits des provinces que l'on croyait inviolables ne seraient qu'illusoires et les assises mêmes de la Confédération canadienne seraient en péril. Sous le prétexte facile de légiférer "pour la paix, l'ordre et le bon gouvernement du Canada", le pouvoir central aurait dans tous les cas, l'autorité nécessaire d'intervenir

(1) [1936] S.C.R. 398.
(2) (1881-82) 7 A.C. 829.
(3) [1925] A.C. 396.
(4) [1946] A.C. 193.

dans le domaine provincial, et le résultat évident de cette théorie, si malheureusement elle était admise, serait de modifier fondamentalement la distribution des pouvoirs législatifs attribués par la Constitution de 1867, et par conséquent, méconnaître non seulement la lettre, mais aussi l'esprit de l'Acte de l'Amérique Britannique du Nord, tel que l'ont compris ceux qui en furent les inspirateurs. Comme le disait le Juge en chef Anglin en 1913 (re Insurance Act (1)), "There would be few subjects of civil rights upon which it (the Parliament of Canada) might not displace the provincial power of legislation".

Je ne trouve pas que des circonstances exceptionnelles, susceptibles de *mettre en péril la vie nationale du Canada,* se rencontrent dans le cas qui nous occupe. Nous sommes bien loin des conditions requises par la jurisprudence de cette Cour et du Conseil Privé, qui pourraient justifier le Parlement Fédéral de se substituer à l'autorité provinciale, et de légiférer sur des matières "de droit civil" d'une "nature locale et privée", qui sont essentiellement du domaine des provinces.

Si même ces produits offraient quelque danger à la santé, je ne crois pas que leur réglementation dans le pays serait de la compétence fédérale. Mais si pareil danger a jamais existé, il est entièrement disparu maintenant, et c'est non seulement le droit mais aussi l'obligation des tribunaux de s'enquérir si les circonstances qui justifiaient le Parlement Fédéral d'agir subsistent toujours. Il y a une présomption qu'elles subsistent, et c'est la partie qui invoque le contraire qui doit le démontrer. Comme l'a dit le Conseil Privé dans *Fort Frances Pulp & Power* (2):—

> The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of Law is loath to enter. No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide in overruling the decision of the Government that exceptional measures were still requisite.

(1) (1913) 48 S.C.R. 260 at 312. (2) [1923] A.C. 695 at 706.

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Voir au même effet, Anglin J. (1).

Dans le cas présent, la présomption est complètement détruite. Le préambule de la loi de 1882, qui disait que ces produits étaient nuisibles à la santé est maintenant disparu. La margarine et l'oléomargarine ont d'après les sociétés médicales et d'après l'aveu même du Gouverneur Général en Conseil les mêmes qualités nutritives que le beurre; la manufacture et la vente en sont permises dans tous les pays civilisés du monde, et on en servait à nos soldats au cours des deux dernières guerres. La valeur nutritive ne fait pas de doute, et l'urgence de préserver la santé nationale ne peut être invoquée pour soutenir la validité de la loi.

Le but actuel de la loi ne peut pas être autre que de donner une préférence au beurre sur un autre produit également comestible. Ceci ne peut pas être une justification pour enlever aux provinces des pouvoirs que leur garantit la Constitution.

Le second argument invoqué par le Procureur Général du Canada est qu'en défendant l'importation, la vente et la possession de ces produits, le parlement canadien a imposé une *prohibition* accompagnée de *sanctions,* et a en conséquence érigé en *crime* toute violation de la loi. Or, en matière criminelle dit-on, le Parlement fédéral est la seule autorité compétente. Je n'oublie pas les définitions du crime et du droit criminel qui ont été données déjà, mais celles-ci doivent se lire et s'interpréter avec les tempéraments qui y ont été apportés.

C'est ainsi que l'on voit dans *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (2) le passage qui suit:

> 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 coextensive; 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

(1) (1913) 48 S.C.R. 260 at 311. (2) [1931] A.C. 310 at 324.

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.

Dans *Attorney-General for British Columbia v. Attorney-General for Canada* (1) le Comité Judiciaire a dit:

The object of an amendment of the criminal law as a rule is to deprive the citizens of the right to do that which, apart from the amendment, he could lawfully do.

Mais dans ce dernier jugement, (1) Lord Atkin dit aussi:

The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not *in the guise of enacting criminal legislation* in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them.

Auparavant en 1929, le Juge Newcombe dans la Référence sur *Validity of the Combines Investigation Act* (2) s'était déjà exprimé ainsi:

It is not necessarily inconsistent, and I do not think it was meant to be incompatible, with the notion, that one must have regard to the subject matter, the aspect, the purpose and intention, instead of the form of the legislation, in ascertaining whether, in producing the enactment, Parliament was engaged in the exercise of its exclusive and comprehensive powers with respect to the criminal law, or was attempting, in excess of its authority, under colour of the criminal law, to entrench upon property and civil rights, or private and local matters, in the provinces; and when, in the case of the *Combines and Fair Prices Act*, 1919, as in the case of the *Insurance Act*, 1910, their Lordships found that Parliament was really occupied in a *project of regulating property and civil rights*, and outside of its constitutional sphere, there was no footing upon which the exercise of Dominion powers, with relation to the criminal law, could effectively be introduced—no valid enactment to which criminal sanction could be applied.

M. le Juge Newcombe s'appuyait évidemment sur le jugement rendu par le Conseil Privé dans *The Board of Commerce Act and the Combines and Fair Prices Act* (3) où il est dit:

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

(1) [1937] A.C. 368 at 376.
(2) [1929] S.C.R. 409 at 422.
(3) (1922) 1 A.C. 191 at 198.

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provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application. For analogous reasons their Lordships think that s. 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada, cannot be read as enabling that Parliament to trench on Provincial rights, such as the powers over property and civil rights in the Provinces exclusively conferred on their Legislatures. Full significance can be attached to the words in question without reading them as implying such capacity on the part of the Dominion Parliament. It is essential in such cases that the new judicial establishment should be a means to some end competent to the latter.

Mais il me semble que la prétention du Procureur Général du Canada, à l'effet que la législation attaquée doit être déclarée constitutionnelle parce qu'elle est du domaine du droit criminel, ne peut être acceptée par suite des jugements que je viens de citer et surtout comme résultat de la décision rendue par le Conseil Privé en 1924, dans une cause de *Attorney General for Ontario and Reciprocal Insurers and Attorney General for Canada* (1). Dans cette cause, il s'agissait de déterminer la légalité d'un amendement que le Parlement Fédéral avait apporté au Code Criminel, dans lequel il était stipulé que c'était une offense criminelle punissable de sanctions sévères, pour une compagnie fédérale ou pour tout étranger, de solliciter ou d'accepter des risques d'assurance à moins qu'une licence fédérale n'ait été préalablement obtenue. Cette législation était évidemment une tentative pour obtenir par un moyen détourné des résultats recherchés par la Loi d'Assurance de 1910, qui avait été déclarée ultra vires des pouvoirs du Parlement Fédéral, dans *Attorney General for Canada* v. *Attorney General for Alberta* (2). Voici ce que disait Sir Lyman Duff (1):

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the subject of which, as Lord

(1) [1924] A.C. 328 at 342. (2) (1916) 1 A.C. 588.

Watson said in *Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892) A. C. 437, 441, was "not to weld the Provinces into one or to subordinate the Provincial Governments to a central authority." "Within the spheres allotted to them by the Act the Dominion and the Provinces are." as Lord Haldane said in *Great West Saddlery Co. v. The King* (1921) 2 A. C. 91, 100, "rendered in general principle coordinate Governments."

Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

Le cas décidé dans cette cause dispose, il me semble, de la prétention qu'il s'agit en l'occurrence de législation criminelle. Sous le prétexte de légiférer en matière criminelle, l'autorité fédérale qui normalement est compétente en la matière ne peut pas empiéter dans le domaine provincial, sur des matières où son autorité légale ne pourrait autrement s'exercer. Le Parlement Fédéral ne peut pas plus contrôler les contrats de ventes et d'achats de margarine et d'oélomargarine qu'il ne peut contrôler les contrats d'assurance, et les raisons qui justifient la décision du Conseil Privé s'appliquent également à la présente cause.

On peut, je crois, disposer rapidement de la prétention que l'autorité du Parlement Fédéral de légiférer sur la margarine et l'oléomargarine lui vient de l'article 95 de l'Acte de l'Amérique Britannique du Nord qui détermine les pouvoirs du Fédéral et du Provincial en matières agricoles. L'article 5 *a*) de la Loi de l'Industrie Laitière n'est pas une législation agricole. La margarine et l'oélomargarine sont essentiellement le résultat de transformations industrielles, et en conséquence la législation n'est pas une législation se rapportant à l'agriculture, mais bien à des articles de commerce. Vide (*The King v. Eastern Terminal Elevator Co.* (1); (*Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*) (2).

(1) [1925] S.C.R. 434 at 457. (2) [1933] A.C. 168.

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L'article 91 (2) "Réglementation du Trafic et du Commerce" a aussi été invoqué pour justifier la législation. Ici une distinction, je crois s'impose, selon qu'il s'agisse d'un commerce d'une nature purement locale et privée dans une province, et la réglementation du commerce extérieur. En 1881, *Citizens' Insurance vs. Parsons,* (1), il a été décidé que les provinces pouvaient légiférer en matière de commerce et y imposer des conditions, si ce commerce ne dépassait pas les bornes d'une province particulière, et plus tard, dans *National Products Reference,* (2), Sir Lyman Duff disait:

> It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

Sur ce point, la jurisprudence me semble définitivement fixée, et il faut en conséquence conclure que la réglementation du commerce de la margarine et de l'oléomargarine dans une province, vu qu'il a un caractère d'une nature locale et privée, n'est pas du domaine du gouvernement fédéral. En ce qui concerne la prohibition d'importer d'un pays étranger, je crois que la situation doit être envisagée sous un angle différent.

Je n'oublie pas que 91, para. (2) de l'Acte de l'Amérique Britannique du Nord "Réglementation du Trafic et du Commerce" a été interprété par les tribunaux et que dans *Attorney General for Ontario v. Attorney General for the Dominion* (3), on a déclaré que le pouvoir de réglementer suppose nécessairement la conservation de la chose qui fait le sujet de la réglementation. Cet article de la Constitution canadienne donnerait au Parlement Fédéral le pouvoir de réglementer un commerce mais ne lui conférerait pas l'autorité voulue pour le supprimer. Il faut s'incliner devant cette décision du Conseil Privé, mais je suis clairement d'opinion, sauf peut-être dans quelques cas exceptionnels, dont il n'est pas question ici, que l'importation d'un

(1) (1881-82) 7 A.C. 96.
(2) [1936] S.C.R. 398 at 410.
(3) [1896] A.C. 348 at 363.

produit manufacturé peut être prohibé par le Parlement Fédéral. Si ce n'est pas en vertu de 91 (2) de la Constitution, ce sera sûrement en vertu du pouvoir résiduaire, qui par ce même article 91 est attribué au Parlement Fédéral, et lui permet de légiférer sur les matières qui ne sont pas de la compétence provinciale, et qui ne sont pas prévues dans l'Acte de l'Amérique du Nord.

Il résulte de tout ceci que je suis d'opinion que l'article 5 *a*) est *ultra vires* en partie, des pouvoirs du Parlement Fédéral. Ce dernier ne peut en effet défendre la fabrication, la vente ou la possession pour la vente de la margarine et de l'oléomargarine, mais a le droit d'en interdire l'importation.

On a prétendu que tout l'article doit être déclaré *ultra vires* parce qu'il contient à la fois et la défense d'importation et les autres prohibitions que je viens de mentionner. Le tout serait si intimement lié ensemble que les prohibitions ne pourraient pas être séparées, vu que le Parlement Fédéral n'en aurait pas imposé une seule, isolée, sans les imposer toutes. Je ne crois pas pouvoir accepter cette proposition. Je crois au contraire qu'il est logique de penser que le Parlement Fédéral aurait pu ne défendre que l'importation sans imposer les autres prohibitions.

Le 28 mai 1886 en vertu de la loi des Douanes, l'importation de l'oléomargarine, de la "butterine" et des autres substituts du beurre a été prohibée, et l'on retrouve cette loi qui est encore en vigueur, à l'article 14 de la loi des Douanes (chap. 44 S.R.C. 1927). Ce n'est que le 2 juin 1886, c'est-à-dire quelques jours plus tard que fut sanctionnée la loi à "l'Effet de Prohiber la fabrication et la vente de certains substituts du Beurre." (49 Victoria chap 42) où il n'est pas question d'importation, mais seulement de fabrication et de vente. Ce n'est que plus tard en 1903, comme je l'ai signalé au début de ces remarques, que l'importation a été défendue par le Statut 3 Ed. VII, chap. 6. La prohibition d'importation s'appliquait non seulement à l'oléomargarine et aux substituts du beurre, comme dans la loi des Douanes, mais à un plus grand nombre de produits. On a voulu dans un statut particulier bannir l'importation de ces produits, qui par la loi des Douanes, l'étaient déjà en partie. Je n'ai pas de doute que le Parlement Fédéral, même s'il

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avait su que la législation se rapportant à la fabrication et à la vente était *ultra vires,* aurait quand même prohibé l'importation. Son désir de le faire apparaît dans la loi des Douanes, et dans la législation subséquente. (*Attorney-General for Alberta v. Attorney-General for Canada* (1)).

Enfin on a tenté de justifier la validité de l'article 5(*a*) en soumettant que cet article, même s'il n'était pas originairement de la compétence du Parlement Fédéral, est "incidental to" la loi de l'Industrie Laitière, qui assurément a été validement adoptée. Je ne crois pas qu'il en soit ainsi. Je pense plutôt que les prohibitions contenues à l'article 5(*a*) ne constituent, comme je l'ai dit déjà, qu'une préférence accordée à un autre produit, et sont entièrement indépendantes de la loi de l'Industrie Laitière. Je crois aussi que le Parlement aurait adopté la loi de l'Industrie Laitière sans cet article 5(*a*).

Ma réponse à la question soumise est donc la suivante:

L'article 5(*a*) de la loi de l'Industrie Laitière est *ultra vires* des pouvoirs du Parlement du Canada, en ce qui concerne les prohibitions de fabriquer, offrir, vendre ou avoir en sa possession pour la vente. La prohibition d'importer est *intra vires* de ses pouvoirs.

RAND, J.: His Excellency in Council has referred to this Court the following question:—

> Is section 5(*a*) of the Dairy Industry Act, R.S.C. 1927, Chapter 45, ultra vires of the Parliament of Canada either in whole or in part and if so in what particular or particulars and to what extent?

The section is as follows:—

> 5. No person shall
> (*a*) manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream;

To a proper understanding of the controversy, a statement of the history of the legislation is necessary. The first pertinent enactment is chapter 37 of 1886, an amendment to the Customs Duties Act, which by section 5, s.s. 2 enacted:—

> The importation of oleomargarine, butterine, and all such substitutes for butter, is hereby prohibited, under a penalty of not less than two hundred nor more than four hundred dollars for each offence, and the forfeiture of such goods, and of all packages in which they are contained.

(1) [1947] A.C. 503 at 518.

Although passed on June 2nd, 1886 it was retroactive to May 28th of that year. In the Revised Statutes of the same year the language was changed by substituting for "and all such substitutes" the words "or other similar substitutes". This latter form has been preserved to the present time with the addition in 1907 by chapter 11 of the words "and process butter or renovated butter".

Next there is chapter 42 of the statutes of 1886 passed on the same day, June 2nd:—

WHEREAS the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof; Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. No oleomargarine, butterine or other substitute for butter, *manufactured from any animal substance* other than milk, *shall be manufactured in Canada,* or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.

In the same year the Act was incorporated in the Revised Statutes as chapter 100, and as is usual in the case of revisions, the preamble was omitted.

In 1903 the Butter Act was enacted as chapter 6 of the statutes of that year and an important change was introduced into the provision dealing with butter substitutes by the language of section 5:—

No person shall manufacture, *import into Canada,* or offer, sell or have in his possession for sale, any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from *any fat other than that of milk or cream.*

This Act was in the revision of 1906 incorporated as Part VIII of the Inspection and Sale Act, chapter 85, R.S.C. 1906. In Schedule A, Vol. III, R.S.C. 1906, at page 2941, chapter 100 of the Revised Statutes is repealed.

Later, in 1914, Part VIII was repealed and the present provision enacted as section 5 of the Dairy Industry Act, chapter 7 of the statutes of that year. This later became chapter 45, R.S.C. 1927.

The question of the preamble was raised. Ordinarily a preamble indicates the purpose of the statute and it may be a guide to the meaning and scope of the language where that is doubtful or ambiguous. But when the question is

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the real character of the legislation for the purposes of jurisdiction between two legislatures under a federal constitution, different considerations arise. A legislation cannot conclude the question by a declaration in a preamble: at most it is a fact to be taken into account, the weight to be given to it depending on all the circumstances; and it is significant here that the only prohibitory enactment containing a preamble did not include margarine.

But whatever might have been the case of the 1886 legislation, the situation now is that not only has the preamble disappeared, but its recital of fact is admittedly no longer true of either margarine or oleomargarine. It is conceded that both of them—the latter containing animal fat other than milk added to the ingredients, chiefly vegetable oils, of the former—are substantially as nutritious, possess as much energy value and are as free from deleterious effects as butter itself; and that I take to have been the state of things in 1914. Between December 1st, 1917 and September 30th, 1923 approximately 52,000,000 lbs. of oleomargarine was either manufactured in or imported into Canada under the authorization of both order in council and statute. Margarine has become a staple in Great Britain and on the European continent, and in the United States its use is widespread. When in 1903 importation was banned, "animal substance" changed to "any fat", and the prohibited substitutes thus enlarged to include those made from vegetable oils, the value of the preamble was greatly impaired; and the repeal of Part VIII together with the enactment of the Dairy Industry Act in the situation of 1914 removes any residue that might have survived. To ascertain then the true nature and substance of the legislation—which is the initial determination—I deal with it as free from any such indication of purpose.

The appearance of the provision in a statute dealing comprehensively with the dairy industry and the inclusion of prohibition of importation, the ordinary mode of protection of industry in its ultimate form, are, for this initial purpose, of considerable significance. On the other hand,

the scope and importance of agriculture in the economy of this country, the part played by the dairy industry as an essential branch of it, and the desirability of maintaining a market demand for butter to meet the seasonal exigencies of that industry, are beyond controversy. What, then, in that whole background is the true nature of the enactment?

Mr. Varcoe argues that it is simply a provision of criminal law, a field exclusively Dominion, and the issue, I think, depends upon the validity of that contention. In *The Proprietary Articles Trade Association vs. Attorney-General of Canada,* (1), Lord Atkin rejected the notion that the acts against which criminal law is directed must carry some moral taint. A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

In examining the question, we are to consider not only the matters and conditions upon which the legislation will operate but as well its consequences; and in addition to what will be judicially noticed, evidence may be presented in a case which calls for it; *Attorney-General of Alberta vs. Attorney-General of Canada* (2).

Criminal law is a body of prohibitions; but that prohibition can be used legislatively as a device to effect a positive result is obvious; we have only to refer to Adam Smith's Wealth of Nations, Vol. II, chapters 2 and 3 to discover how extensively it has been used not only to keep foreign goods from the domestic market but to prevent manufactures in the colonies for the benefit of home industries; and as late as 1750 for that object, certain means of iron and steel production in British North America were by statute forbidden; Ashley, Surveys, Historic & Economic, page 327. The Court in its enquiry is not bound by the ex facie form of the statute; and in the ordinary sense of the word, the purpose

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

(2) [1939] A.C. 117, at 131.

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of a legislative enactment is generally evidential of its true nature or subject matter: *Bryden vs. Attorney-General of British Columbia,* (1): *Attorney-General of Ontario vs. Rec. Insurers* (2): *In re Insurance Act of Canada,* (3) *Attorney-General of Alberta vs. Attorney-General of Canada, supra.* Under a unitary legislature, all prohibitions may be viewed indifferently as of criminal law; but as the cases cited demonstrate, such a classification is inappropriate to the distribution of legislative power in Canada.

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces: *Shannon vs. Lower Mainland Dairy Board,* (4).

The public interest in this regulation lies obviously in the trade effects: it is annexed to the legislative subject matter and follows the latter in its allocation to the one or other legislature. But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of interprovincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction.

(1) [1899] A.C. 580.
(2) [1924] A.C. 328.
(3) [1932] A.C. 41.
(4) [1938] A.C. 708.

This conclusion is not in conflict with *Attorney-General of British Columbia* v. *Attorney-General of Canada,* (1), (Section 498a of the Criminal Code). There, the essential nature of the legislation was not the equalization of civil rights between competitors or promoting the interest of one trade as against another; it was the safeguarding of the public against the evil consequences of certain fetters upon free and equal competition. There is no like purpose here; there is nothing of a general or injurious nature to be abolished or removed: it is a matter of preferring certain local trade to others.

Is the legislation then within the regulation of trade and commerce? As early as *Citizens' Insurance* v. *Parsons* (2) it was laid down that the reconciliation of the powers granted by the constitutional act required a restriction of the "full scope of which in their literal meaning they ('the regulation of trade and commerce') are susceptible"; and it was so necessary "in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy, which as appears from the scheme of the Act as a whole, the provinces were intended to enjoy"; (3). That and subsequent pronouncements of the Judicial Committee were summarized by Duff, C.J. in the *Natural Products reference,* (4):

> It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

Now, if the regulation of local trade in particular commodities is excluded, a fortiori the control of the manufacture of those commodities for that trade would be so. The logical conclusion of the contention is, as Mr. Varcoe conceded, that *King* v. *Eastern Elevator Company,* (5) was wrongly decided. But so far from that, the decision was expressly approved by the Judicial Committee in the *Natural Products reference, supra* at page 387.

(1) [1937] A.C. 368.
(2) (1881-82) 7 A.C. 96.
(3) [1931] S.C.R. 357 at 366.
(4) [1936] S.C.R. 398 at 410.
(5) [1925] S.C.R. 434.

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Finally, it was said the legislation related to Agriculture. Its object, I agree, is to benefit the trade in a product of agriculture; but that is a mere consequential effect and does not of itself relate the legislation to agriculture. The *Natural Products reference, supra* by ruling out of the scope of Dominion power the regulation of local trade in the products of agriculture has done so likewise in respect of the manufacture of substitute products.

Then undoubtedly the dairy industry has an aspect of concern to this country as a whole, but as it was said in *Attorney-General of Ontario* v. *Attorney-General of Canada,* (1) if the fact of such an interest or that the matter touched the peace, order and good government of Canada was sufficient to attach the jurisdiction of Parliament, "there is hardly a subject enumerated in sec. 92 upon which it might not legislate, to the exclusion of the provincial legislatures". There is nothing before us from which it can be inferred that the industry has attained a national interest, as distinguished from the aggregate of local interests, of such character as gives it a new and pre-eminent aspect within the rule of the *Russell case,* (2) as interpreted in *Attorney-General of Ontario* v. *Canada Temperance Federation,* (3). Until that state of things appears, the constitutional structure of powers leaves the regulation of the civil rights affected to the legislative judgment of the province.

There is next the prohibition of importation of these substances. It has been observed that the power of regulation assumes, unless enlarged by the context, the conservation of the thing to be regulated; Lord Watson in *Attorney-General of Ontario* v. *Attorney-General of Canada, supra* at 363. The matter being examined by Lord Watson was the power of Parliament to enact the Temperance Act of 1886 as being for the "regulation of trade and commerce"; the object of the statute was "to abolish all such transactions (in liquor)" within the area adopting it; and their lordships were unable to regard such prohibitions as regulation of trade. Although under the enactment certain transactions in liquor escaped the ban, it was not in their

(1) [1896] A.C. 348 at 361.
(2) [1899] A.C. 829.
(3) [1946] A.C. 193.

interest that other transactions were forbidden; and I do not take the judgment to mean that the prohibition of trade in a commodity for a strictly trade purpose, which was not the purpose there, can never be trade regulation. The matter of regulation here is not margarine in isolation; it is butter and its substitutes as a group of commodities in competition; and the legislation fashions their relations inter se in the aspect of foreign trade, clearly an exclusive Dominion field. Under the regulation of that trade, one commodity might be admitted free of duty, and others at different rates: *Attorney-General of British Columbia* v. *Attorney-General of Canada,* (1); and the extension to prohibition would not change the essential nature of the restriction. To the historical references already made on this subject, there can be added that of section 43 of the Act of Union (1840) which after reciting that the Imperial Parliament would not thereafter impose any taxation on the North American provinces "except only such duties as it might be deemed expedient to impose for the regulation of commerce" proceeded to enact that nothing should prevent the exemption of any law made "for establishing regulations and *prohibitions*" in relation to commerce. As this was a reservation from provincial autonomy, the apparent disjunction of powers is not material to the language of the constitutional instrument of the Dominion; but the terms disclose the modes of trade control then practised. Such scope of action is clearly necessary to the nation's jurisdiction over trade with other states. Only Parliament can deal with foreign commerce; provincial power cannot in any mode, aspect, or degree govern it: and it would be anomalous that the jurisdiction to which regulation is committed, which alone can act, and which in this segment of trade is in substance sovereign, should be powerless to employ such an ordinary measure of control.

The remaining question is whether manufacture, sale, etc. and importation can be taken as severable. Having regard to the purpose of the legislation, the restrictions are undoubtedly intended to be cumulative. They are in no sense dependent upon or involved with each other, though no doubt both are necessary to the complete benefit

(1) [1924] A.C. 222 at 225.

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envisaged. But distinct in operation and effect, they are to be taken as enacted distributively and not with the intention that either all or none should come into force.

My answers to the questions, therefore, are:—

1. The prohibition of importation of the goods mentioned in the section is intra vires of Parliament.
2. The prohibition of manufacture, possession and sale is ultra vires of Parliament.

KELLOCK, J.:—This reference raises the question of the validity of section 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, cap. 45. In the consideration of the conflicting contentions it is first necessary to determine the true nature and character of the legislation, its "pith and substance". In this inquiry the legislative history of the section in question, which goes back to cap. 42 of 49 Victoria, is relevant. In the preamble to the last mentioned statute it is recited that "Whereas the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health" and section 1 provides that

> 1. No oleomargarine, butterine or other substitute for butter, manufactured from any *animal* substance other than milk, shall be manufactured in Canada, or sold therein...

It is to be noted that the "certain" substitutes for butter "heretofore" manufactured, the manufacture and sale of which are prohibited, are those manufactured from animal substances other than milk. By this language therefore, margarine as distinct from oleomargarine is not affected as the former is manufactured exclusively from vegetable oils, while oleomargarine has in addition some animal fat, usually beef.

Cap. 42 of 49 Victoria became cap. 100 of R.S.C. 1886, but the preamble of the original Act was not continued and does not reappear in any later legislation. Subsequently by 3 Edward VII, cap. 6, "The Butter Act, 1903" was passed, section 5 of which prohibits the manufacture, importation or sale of "any oleomargarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream". It is to be

observed that importation, as well as manufacture and sale became prohibited and the prohibition is no longer limited to substitutes for butter manufactured from animal substances. Accordingly, margarine would appear to have become included in the prohibitions of this legislation.

In 1906 by cap. 85 of the Revised Statutes of that year, the General Inspection Act, cap. 99 of the Revised Statutes of 1886, the Grain Inspection Act, 4 Edward VII, cap. 15, and the Butter Act of 1903, became consolidated in the "Inspection and Sale Act", the provisions formerly constituting the Butter Act becoming part VIII of the Act. Section 298 is in the same terms as section 5 of the 1903 Act, the penalty section being section 309.

Part VIII of the above Act was repealed by 4 and 5 Geo. V, cap. 7, the "Dairy Industry Act, 1914". This Act was entitled an "Act to regulate the manufacture and sale of dairy products and to prohibit the manufacture or sale of butter substitutes". Its enacting provisions deal with the matters indicated. Section 5 (*a*) reproduces the substance of section 298 of the 1906 Statute. Margarine is, however, for the first time expressly mentioned.

The legislation of 1927 in substance reproduces the provisions of the 1914 Statute but also consolidates therewith the provisions of 9-10 Edward VII, cap. 59, the "Milk Test Act", and 11-12 Geo. V, cap. 28, the "Dairy Produce Act". By section 2 (*n*) "oleomargarine" is defined as "any food substance other than butter, of whatever origin, source or composititon which has the appearance of and is prepared for the same uses as butter". This definition therefore includes margarine.

Mr. Varcoe argues that the existing legislation is still to be considered as legislation in the interests of public health on the basis that when the original prohibitions with respect to oleomargarine, as distinct from margarine were imposed, that was the ground upon which Parliament expressly proceeded. He says the original Act was in no sense a temporary Act and the dropping of the preamble is immaterial.

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In support of this contention reference was made to the recent decision of the Privy Council, *Attorney General for Ontario* v. *Canada Temperance Federation,* (1) where their Lordships had to deal with the Canada Temperance Act, R.S.C. 1927, cap. 196, Parts 1, 2 and 3 of that Statute having had its origin in 1878. It was held that the original Act, having been validly passed in the exercise of authority existing in Parliament at that time and being a permanent and in no sense a temporary Act, could not be challenged on the ground that the circumstances, the existence of which justified the legislation in 1878, no longer continued to exist in 1927. The material provisions of the Act of 1927 were admittedly identical with those of 1878.

As to the matter of public health, the Order of Reference makes no distinction on this basis between margarine and oleomargarine. The Order includes an extract from an article in the Canadian Medical Association Journal of August, 1947, respecting "margarine". This article has the approval of the Department of National Health and Welfare and is as follows:

> One factor absent in vegetable oils is Vitamin A, and if the lack of this could not be remedied it would seriously weaken the value of margarine. But it is quite easy to add as much Vitamin A as is needed, and so make margarine contain more of this Vitamin than the richest butter. Even butter is liable to show seasonal variations in its content of Vitamin A. Other vitamins too could be added to margarine such as Vitamin D., for example, of which butter contains very little. As a source of energy, margarine and butter are exactly equal.

The Order also sets out that by P.C. 3044 of October 23, 1917, made under the War Measures Act, the operation of section 5(*a*) of the Dairy Industry Act was suspended and that by cap. 24 of the Statutes of Canada, 1919, 2nd Session, provision was made for the manufacture and importation of "oleomargarine" until August 31, 1920, and for sale thereof until March 1, 1921. By annual amendments the permission contained in the 1919 Act was extended to August 31, 1923, in the case of manufacture and importation, and to March 1, 1924, in the case of sale. It is worthy of note that the "Oleomargarine Act", as the Act of 1919 was entitled, defines "oleomargarine" as meaning and including "oleomargarine, margarine, butterine, or any other

(1) [1946] A.C. 193.

substitute for butter (*a*) which is manufactured wholly or in part from any fat or oil other than from milk and cream, (*b*) which contains no foreign colouring matter and (*c*) which does not contain more than sixteen per cent of water". Section 3 is as follows:

> Notwithstanding anything contained in The Dairy Industry Act, 1914, chapter seven of the statutes of 1914, or in any other statute or law, the manufacture in and importation of oleomargarine into Canada shall be permitted until the thirty-first day of August, one thousand nine hundred and twenty; and the offering for sale, the sale, and the having in possession for sale of oleomargarine shall be permitted until the first day of March, one thousand nine hundred and twenty-one.

During the operation of P.C. 3044 and the subsequent permissive legislation, almost 52,000,000 pounds of the commodity were manufactured or imported into Canada. Presumably it was a shortage in the supply of butter that brought about the legislation above mentioned and it is not to be assumed that in 1919 Parliament was permitting something injurious to public health. On the contrary this legislation appears to me to be a recognition on the part of Parliament that any basis from the standpoint of public health which may have existed for the legislation of 1886 had been removed and that the legislation thereafter was to be regarded as legislation dealing with the production of and trade in articles of food. In fact, apart from the contention now under consideration, the substantial ground upon which the argument in support of the validity of the legislation proceeds is that it is justifiable as a matter of national concern with respect to the dairy industry.

Whatever may have been the situation in 1886 which prompted Parliament then to legislate in the interests of public health, I think it is plain that at least as early as 1914, margarine and oleomargarine as a subject matter of legislation were dealt with as part of the regulation of the dairying industry with no element of public health involved. There never had been any such element so far as margarine was concerned and in the legislation of 1914 both products were expressly dealt with on the same basis. I think therefore that the true nature and character of the legislation stands thus revealed.

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The next contention on the part of the Dominion is that the legislation cannot be said to be within the authority of a provincial legislature under section 92.

In *Attorney-General for Canada* v. *Attorney-General for Alberta*, (1), the Privy Council had to consider section 4 of the Dominion Insurance Act, 1910, by which the carrying on of the business of insurance was prohibited except under a Dominion licence. Section 70 made provision for a penalty. It was held that the legislation was ultra vires. At page 595 Viscount Haldane said:

> It will be observed that s. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the licence of the Dominion Minister... Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the Legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

In the *King* v. *Eastern Terminal Elevator Co.*, (2) Sir Lyman Duff said:

> ...such a principle in truth must postulate authority in the Dominion to assume the regulation of almost any trade in the country, provided it does so by setting up a scheme embracing the local, as well as the external and interprovincial trade; and regulation of trade, according to the conception of it which governs this legislation, includes the regulation in the provinces of the occupations of those engaged in the trade, and of the local establishments in which it is carried on. Precisely the same thing was attempted in the Insurance Act of 1910, unsuccessfully.

In his submission counsel for the Attorney-General supported this branch of his argument on the ground that a single province, or all the provinces acting together, could not effect that which is effected by section 5(*a*) of the *Dairy Industry Act*, and that therefore legislative authority must reside in the Dominion. With respect to a similar argument Sir Lyman Duff in the above case said (2):

> The other fallacy is... that the Dominion has no such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the Board of Commerce Case, 1922, 1 A.C., 191, and, indeed, is the view

(1) (1916) 1 A.C. 588 at 595. (2) [1925] S.C.R. 434 at 447.

which was unsuccessfully put forward in the Montreal Street Railway Case, 1912 A.C., 333, where it was pointed out that in a system involving a division of powers such as that set up by the British North America Act, it may often be that subsiduary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

In the *Board of Commerce* case (1), the facts of which need not be repeated, Viscount Haldane said:

> It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. *For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92.*

Under section 4(1) of the Natural Products Marketing Act, 24-25 Geo. V, cap. 57, the Dominion Marketing Board was given power, inter alia, to "prohibit the marketing of any of the regulated products of any grade, quality or class". In giving the judgment of the Privy Council on the Reference (2) concerning the validity of this statute Lord Atkin said:

> There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade. It is therefore plain that the Act purports to affect property and civil rights in the Province, and if not brought within one of the enumerated classes of subjects in s. 91 must be beyond the competence of the Dominion Legislature.

On this branch of the argument Mr. Varcoe contends that prohibition of manufacture and sale of an article, if within the jurisdiction of a province, must fall within section 92 (16) rather than 92 (13) and in support of this proposition he relies upon *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (3). It was held in that case that the previous decision in the *Local Prohibition case* (4) had been rested upon 92 (16) rather than 92 (13). But the basis of the decision in the last mentioned case as thus interpreted was that in legislating with respect to the suppression of the liquor traffic the object in view is the

(1) (1922) 1 A.C. 191 at 197.
(2) [1937] A.C. 377 at 386.
(3) [1902] A.C. 73 at 79.
(4) [1896] A.C. 348.

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abatement or prevention of a local evil rather than the regulation of property and civil rights. I do not think therefore that the contention finds any support in these authorities. It is plain from the authorities already referred to that interference by the Dominion in the way of prohibiting the carrying on of a particular business by the inhabitants of a province, except upon terms laid down by the Dominion is an interference with civil rights in the province, a subject committed to the provincial legislatures under section 92 (13).

It will be convenient at this point to deal with another ground upon which the legislation is sought to be supported, namely, the regulation of trade and commerce within the meaning of section 91 (2). In the *Insurance case* (1), Viscount Haldane said:

> Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces... No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded.

In the *Board of Commerce* case (2) their Lordships, after pointing out that it may well be that it is within the power of Parliament to require statistical or other information went on to say:

> But even this consideration affords no justification for interpreting the words of s. 91, sub-s. 2, in a fashion which would... make them confer capacity to regulate particular trades and businesses.

The earliest case under section 91 (2) is *Citizens' Insurance Company* v. *Parsons* (3), where it was laid down that this power involves regulation relating to general trade and commerce. I think the provisions of the legislation here in question go beyond the general and fail as an attempt to regulate a particular trade or business. See also the *Natural Products Reference* (4).

(1) (1916) 1 A.C. 588 at 596.
(2) [1922] 1 A.C. 191 at 201.
(3) (1881-82) 7 A.C. 96.
(4) [1937] A.C. 377 at 387.

Coming to the question of criminal law, it is my opinion that the legislation is not to be supported upon the basis suggested. In the *Board of Commerce* case Viscount Haldane said at page 199:

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

In the *Reciprocal Insurers'* (1) case, Sir Lyman Duff in delivering the judgment of the Privy Council said:

> Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion... Such a procedure cannot, their Lorships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by the judgments of this Board.

The principle of these authorities was again affirmed in the *Proprietary Articles'* (2) case. In the course of his judgment in that case Lord Atkin said at page 324:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?

Lord Atkin, lower down on the same page, refers to what was said by Viscount Haldane in the *Board of Commerce* case at pp. 198-9 of the report, the latter part of which I have quoted above and says that the passage was not intended by the Board as a definition but that

> In that case their Lordships appear to have been contrasting two matters—one obviously within the line, (i.e. criminal law) *the other obviously* outside it.

At page 317 Lord Atkin had already said:

> But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class. On this issue the legislative history may have evidential value.

(1) [1924] A.C. 328 at 340. (2) [1931] A.C. 310.

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And at page 323:

> ...and if Parliament *genuinely* determines that commercial activities which can be so described are to be suppressed in the *public* interest, their Lordships see no reason why Parliament should not make them crimes...

Again in *Attorney-General for British Columbia* v. *Attorney General for Canada,* (1) Lord Atkin said:

> The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92... On the other hand, there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments.

In the *Unemployment and Social Insurance Reference,* (2) Lord Atkin said:

> It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.

The argument in support of the present legislation that "It is sufficient that Parliament has unconditionally prohibited the acts or omissions in question with sanctions to be applied by the criminal courts by way of fine or imprisonment" purporting to be based upon the decision in the Proprietary Articles' case overlooks the first requirement as laid down in the case itself, viz., that it is the true nature and character of the legislation which is to be regarded. In my opinion the provisions of section 91 (27) afford no support for the legislation here in question.

Once it is determined that the real object of legislation is to advance the interests of one business or trade by prohibiting another, it cannot be said, in my opinion, that the legislation is to be justified as a genuine determination by Parliament to suppress commercial activities in the public interest. The real object of Parliament in such case is not the suppression but something else, namely, the promotion.

The contention just mentioned depends, in my opinion, upon a too literal interpretation of the first passage quoted

(1) [1937] A.C. 368 at 375. (2) [1937] A.C. 355 at 367.

above from the judgment of Lord Atkin in the Proprietary Articles' case taken out of its context. What was said by Duff J., as he then was, in delivering the judgment of the Privy Council in the *Reciprocal Insurers'* case, (1) approved of in the *Insurance Reference,* (2) is appropriate:

> In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the provinces, it cannot be upheld as valid.

It is further argued that while it may be that the provinces are not excluded from legislating from the local or provincial point of view with regard to the matters dealt with by the legislation here in question, nonetheless there is a standpoint from which the Dominion has jurisdiction under the residuary power given by section 91.

Although legislative power on the part of Parliament may not, in any given case, be found in any of the enumerated heads, it may of course, be nonetheless a matter upon which Parliament may legislate because it concerns the peace, order and good government of Canada if it lie outside the classes of subjects exclusively assigned to the provinces. But with respect to such a matter, the exception from section 92 which is enacted by the concluding words of section 91, has no application. In legislating within the limits of this power, Parliament ought, to employ the language of Lord Watson in the *Local Prohibition* case, (3) "to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92". Lord Watson went on to say that

> If it were once conceded that the Parliament of Canada has authority to make laws *applicable to the whole Dominion,* in relation to matters which *in each province* are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate to the exclusion of the provincial legislatures.

(1) [1924] A.C. 328 at 342.
(2) [1932] A.C. 41 at 53.
(3) [1896] A.C. 348 at 360.

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In describing the area in which Parliament may legislate in the exercise of the power under consideration, Lord Watson said at p. 361:

> 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 interest 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 or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

The illustration which Lord Watson then proceeds to give is significant of the "dimensions" necessary before the point is reached which justifies Dominion legislation.

In the *Canada Temperance Act,* (1) Viscount Simon in referring to the point now under discussion said:

> In their Lordships' opinion the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its *inherent* nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case, 1932 A.C., 54, and the Radio case, 1932 A.C., 304), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances...

In the *Natural Products Reference* (2), this court had to consider a similar contention with respect to the legislation there in question to which reference has already been made in this judgment. In referring to the language of Lord Watson in the Local Prohibition case, including that quoted above, Duff C. J. described that language as carefully guarded and went on to say at page 419:

> He does not say that every matter which attains such dimensions as to effect the body politic of the Dominion falls thereby within the introductory matter of section 91. But he said that "some matters" may attain such dimensions as to affect the body politic of the Dominion and, as we think the sentence ought to be read having regard to the context, in such manner and degree as may "justify the Canadian Parliament in passing laws for their regulation and abolition..." So, in the second sentence, he is not dealing with all matters of "national concern" in the broadest sense of those words, but only those which are matters of national concern "in such sense" as to bring them within the jurisdiction of the Parliament of Canada.

(1) [1946] A.C. 193 at 205. (2) [1936] S.C.R. 398.

Duff C. J. went on to point out that there had been only one case in which the Judicial Committee had held that legislation with regard to matters which were admittedly ex facie civil rights within a province, had by reason of exceptional circumstances acquired aspects and relations bringing them within the ambit of the introductory clause, namely, the *Fort Frances case* (1). In speaking of the Board of Commerce case the Chief Justice pointed out that the statute there in question was supported among other grounds on the ground that in the year 1919 when it was enacted, the evils of hoarding and high prices in respect of the necessaries of life had attained such dimensions as to affect the body politic of Canada. Nobody denied the existence of the evil; nobody denied that it was general throughout Canada; nobody denied the importance of suppressing it; nobody denied that it prejudiced and seriously prejudiced the well being of the people of Canada as a whole, or that in a loose, popular sense of the words it affected the body politic of Canada; nevertheless, it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament under the introductory clause in the manner attempted. The Chief Justice went on to refer to the *Snider* case (2), the legislation there in question having been framed for the purpose of dealing with industrial disputes. This statute was a permanent and not a temporary act. It authorized the Minister of Labour to take steps to convene, in the case of a dispute, a Board composed of representatives of employer and employee and a nominee of the Minister. Strikes and lockouts were prohibited pending the consideration of the Board. Duff, C.J., said that the importance of the matters dealt with by the statute, the fact that the statute made provision for meeting a condition which prevailed throughout the whole of Canada and for dealing with industrial disputes which, in many and, indeed, most cases, would affect people in more than one province, the fact that the machinery provided had proved to be a valuable instrument in the interests of industrial peace, were not disputed but, nevertheless, the Privy Council negatived the existence of the general principle that the mere fact

(1) [1923] A.C. 695.

(2) [1925] A.C. 396.

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that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent, if it cannot be brought within the heads enumerated specifically in section 91.

In my opinion there is nothing appearing in the Order of Reference which justifies the legislation here in question upon the particular ground now under consideration in the light of the judgment just referred to and the authorities to which it refers. Nor in my opinion is there anything inhering in the nature of the matter of the legislation which can be said to be the concern of the Dominion. I therefore think that effect is not to be given to this contention on behalf of the Dominion.

It is next argued on behalf of the Dominion that the legislation is to be supported under the provisions of section 95 as legislation in relation to agriculture. It may well be the fact that the legislation does directly benefit a section of the population engaged in the business of dairying but in my opinion the legislation is not true legislation "in relation to" agriculture. As was said by Migneault J. in the *King* v. *Eastern Terminal Elevator Co.* (1), "The subject matter of the section is not agriculture but a product of agriculture considered as an article of trade".

I am therefore of opinion that insofar as the section here in question deals with manufacture and sale it is not within the legislative authority of Parliament. Were the provisions of the section incapable of severance, it would not be necessary to consider the question of importation. In my opinion, however, that is not so.

Concurrently with the enactment in 1886 of 49 Victoria, cap. 42, there was also enacted cap. 37, section 5, by way of amendment to the Customs Duties Act by which the importation of "oleomargarine, butterine and all *such* substitutes for butter" were prohibited. By R.S.C. 1886, cap. 33, section 5, the above paragraph was amended to read "no oleomargarine, butterine or other *similar* substitute for butter shall be imported".

In their definitions of "butterine", English and American dictionaries of the latter part of the last century and the

(1) [1925] S.C.R. 434 at 457.

early years of this, indicate that that article is a combination of butter and oleomargarine. I therefore think that the change in language in the Revised Statute of 1886 did not effect any change in the substances covered by the prohibition and that butter substitutes of purely vegetable origin were not included. Accordingly, the importation of margarine, as distinct from oleomargarine, was not prohibited by the customs legislation. No material change in this legislation was made down to and including the Customs Tariff Act, R.S.C. 1927, cap. 44, section 14, Schedule "C", item 1204. In prohibiting the importation of margarine, therefore, section 5 of the *Dairy Industry Act* is more comprehensive than the Customs Tariff Act.

The question therefore is whether on a fair review of the whole matter it is to be assumed that Parliament, had it been called to its attention when legislating in 1927, that it could not legislate as to manufacture and sale, would have legislated with respect to importation alone; *Attorney-General for Alberta* v. *Attorney-General for Canada* (1). In view of the provisions of the Customs Tariff Act, by which Parliament has shown an intention to cover the larger part of the field, I think it reasonable to suppose that Parliament, even though it could not deal with manufacture and sale, would have filled up anything lacking in the Customs Tariff with respect to importation of margarine and substitutes for butter of purely vegetable origin. It therefore becomes necessary to consider the question as to importation.

In *Attorney-General for British Columbia* v. *Attorney-General for Canada,* (2) Lord Buckmaster pointed out that customs legislation is enacted for the purpose of taxation or to protect Canadian industry, or for both reasons, and that in either case it is a matter within the exclusive competence of Parliament as being the raising of revenue or the regulation of trade and commerce. It is obvious that a customs duty enacted for the purpose of protecting Canadian industry, might be designed to increase the price of the imported product and thus to improve the competitive position of local industry, or to restrict or to prohibit importation entirely. That being so, I think it follows that Parliament may prohibit not only by a prohibitory tariff but by

(1) [1947] A.C. 503 at 518. (2) [1924] A.C. 222.

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express legislation, and that in either case the authority so to legislate is to be found in head 2, section 91. I do not think that anything said by Lord Watson in the *Local Prohibition* case (1) stands in the way. In enacting prohibitory legislation with respect to importation in order to protect Canadian industry, Parliament is "conserving" that industry. In the present instance I think the legislation is to be upheld as having been enacted from the aspect of the conservation of the dairy industry against foreign competition.

My answer to the question is that section 5(a) of the *Dairy Industry Act*, R.S.C. 1927, cap. 45, is ultra vires the Parliament of Canada as to manufacture and sale but intra vires as to importation.

ESTEY, J.:—In this reference the validity of sec. 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, ch. 45, as competent Dominion legislation is questioned. Sec. 5(*a*) reads as follows:

> 5. No person shall
>
> (*a*) Manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream;

A brief historical review of this legislation, in view of the various submissions, is desirable. The first legislation enacted by the Parliament of Canada relative to oleomargarine was in 1886, "An Act to prohibit the Manufacture and Sale of certain substitutes for Butter," (S. of C. 1886, ch. 42), which reads as follows:

> Whereas the use of certain substitutes for butter, heretofore manufactured and exposed for sale in Canada, is injurious to health; and it is expedient to prohibit the manufacture and sale thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—
>
> 1. No oleomargarine, butterine or other substitute for butter, manufactured from any animal substance other than milk, shall be manufactured in Canada, or sold therein, and every person who contravenes the provisions of this Act in any manner whatsoever shall incur a penalty not exceeding four hundred dollars and not less than two hundred dollars, and in default of payment shall be liable to imprisonment for a term not exceeding twelve months and not less than three months.

(1) [1896] A.C. 348 at 363.

In the consolidation of 1886 this preamble was not carried forward and the above sec. 1 constituted the entire Act (R.S.C. 1886, ch. 100), until 1906 when it was repealed. (S. of C. 1907, ch. 43, sec. 4—also page IX, Vol. 1, R.S.C. 1906).

In 1903 Parliament passed The Butter Act (S. of C. 1903, ch. 6) and, notwithstanding that the legislation of 1886 prohibiting manufacture and sale was in force (R.S.C. 1886, ch. 100) and so remained until the consolidation of 1906, and the Customs Duties Acts amendment of 1886 (S. of C. 1886, ch. 37, sec. 5) prohibiting the importation of these products was then in force, there was included in sec. 5 of The Butter Act in 1903 a prohibition of the importation, manufacture and sale of oleomargarine, butterine and butter substitutes.

The enactment of 1903 made no reference to either of the 1886 statutes, and in the result both those of 1886 and that of 1903 remained in force until the revision of 1906.

In the revision of 1906 The Butter Act of 1903 was incorporated into Part VIII under the heading "Dairy Products" of an Act entitled "An Act respecting the Inspection and Sale of certain Staple Commodities" (R.S.C. 1906, ch. 85). Sec. 5 of the 1903 Act was carried forward in identical language as sec. 298 in the revision of 1906 (R.S.C. 1906, ch. 85, sec. 298) and is identical in language with sec. 5(*a*) here in question except that in the latter the word "margarine" (added S. of C. 1914, ch. 7) is included after the word "oleomargarine."

Sec. 5(*a*) as included in the *Dairy Industry Act* is but a portion of the prohibitions, restrictions and regulations designed to protect the dairy industry and to regulate the manufacturing and marketing of dairy products. The statute as a whole specifically provides against the adulteration and dilution of these products and authorizes the Governor in Council to make regulations prescribing standards of quality and the classification, grading and other matters in respect of such products.

The material included in the record of this reference indicates that not only have oleomargarine and margarine

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been accepted as articles of food, since some time after the discovery of the original formula in 1867 in many parts of the world, including Great Britain and the United States, but that in Canada, during the First Great War, the legislation prohibiting their importation, manufacture and sale was suspended and from December 1, 1917, to September 30, 1923, over thirty-one million pounds were manufactured and over twenty million pounds were imported into this country. It also includes a published statement approved of by the Department of Public Health which reads in part: "as a source of energy, margarine and butter are exactly equal." It follows that the statement in the preamble of 1886 that "the use of certain substitutes for butter, . . . is injurious to health," in so far as it may refer to oleomargarine and margarine, has no foundation in fact. The foregoing, together with the deletion of this preamble in the consolidation of 1886, the repeal of the statute itself in 1906, the inclusion of the prohibition against importation in the 1903 enactment and the incorporation thereof into a statute relative to the butter industry, and the subsequent legislation, would indicate that Parliament has, since at least 1903, been legislating without regard to the statement contained in the preamble of 1886. Under all of these circumstances, this preamble cannot be regarded as either a basis for or the construction of the present legislation.

In considering the validity of sec. 5(*a*) it is convenient to deal first with the prohibition of the manufacture and sale of these products.

The prohibition of the manufacture and sale in sec. 5(*a*) directly interferes with the freedom of individuals and corporate bodies to engage in the business of manufacturing or selling the specified food products, including oleomargarine and margarine. As such it is legislation in relation to property and civil rights within the meaning of sec. 92 (13), with respect to which the provinces have the exclusive right to legislate, unless the legislation in question may be held to be competent Dominion legislation within the other provisions of the B.N.A. Act.

On behalf of the Dominion it is contended that sec. 5(*a*) is competent Dominion legislation under:

(*a*) Sec. 91 (2) "The regulation of Trade and Commerce."

(*b*) Sec. 91 (27) "The Criminal Law . . ."

(*c*) Peace, Order, and good Government, within the meaning of the opening paragraph of sec. 91.

(*d*) Sec. 95 " . . . in relation to Agriculture . . . "

This legislation in relation to a specific trade or industry is not competent Dominion legislation within the meaning of sec. 91 (2). In 1881 the Privy Council held provincial legislation respecting fire insurance contracts valid. As to the contention that such came under sec. 91 (2) Sir Montague Smith stated: ". . . the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, . . .": *Citizens Ins. Co. of Canada* v. *Parsons* (1). Expressions to similar effect are found in *A.-G. for Canada* v. *A.-G. for Alberta (Dominion Insurance Act, 1910)* (2); *Board of Commerce Case* (3); *Toronto Electric Commissioners* v. *Snider* (4).

In *The King* v. *Eastern Terminal Elevator Co.* (5), the provisions of the Grain Act, 1912 (2 Geo. V, ch. 27, as amended by 9 & 10 Geo. V, ch. 40, sec. 3) and in particular sec. 95 (7) were considered. The importance of the grain trade, and the desirability of the benefits sought by the legislation, including the protection of the external trade in grain were not questioned, nevertheless, the legislation was held to be ultra vires.

Then in the *Natural Products Marketing Act Case* (6), it was held that Dominion legislation with respect to the marketing of natural products was ultra vires, notwithstanding the emphasis laid upon those parts of the Act which dealt with inter-provincial and export trade. The Privy Council stated: "But the regulation of trade and commerce does not permit the regulation of individual forms

(1) (1881-82) 7 A.C. 96 at 113; 1 Cam. 267 at 281.
(2) (1916) 1 A.C. 588 at 596; 2 Cam. 63 at 70.
(3) (1922) 1 A.C. 191; 2 Cam. 253
(4) [1925] A.C. 396; 2 Cam. 363
(5) [1925] S.C.R. 434.
(6) [1937] A.C. 377.

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of trade or commerce confined to the Province," and adopted the language of Duff, C.J., in this Court: *Natural Products Marketing Case* (1) in which he stated:

> Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority.

See also *Shannon* v. *Lower Mainland Dairy Products Board* (2).

Moreover, by its express terms this section prohibits rather than regulates the manufacture and sale, and as pointed out by the Privy Council in *Municipal Corporation of City of Toronto* v. *Virgo* (3), there is a vast difference between the two in that "a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." See also *A.-G. for Ontario* v. *A.-G. for Dominion* (4). Whether, therefore, the legislation be regarded as part of an enactment to protect and regulate the dairy industry or as merely prohibitory in character, it is in either event not competent Dominion legislation within the meaning of sec. 91 (2) "The regulation of Trade and Commerce."

It is then contended that as any infraction of the prohibitions under sec. 5(*a*) constitutes an offence for which penalties are provided under sec. 10 of the *Dairy Industry Act*, that this is valid criminal legislation within the meaning of sec. 91 (27). This contention is based upon the oft-quoted statement that the phrase "criminal law" is used in sec. 91 (27) "in its widest sense": *A.-G. for Ontario* v. *Hamilton Street Rly.* (5) and the language of Lord Atkin in *Proprietary Articles Trade Assoc.* v. *A.-G. for Canada (Combines Investigation Act)* (6):

> ...for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State

(1) [1936] S.C.R. 398 at 412.
(2) [1938] A.C. 708.
(3) [1896] A.C. 88 at 93.
(4) [1896] A.C. 348 at 363; 1 Cam. 481 at 493.
(5) [1903] A.C. 524; 1 Cam. 600
(6) [1931] A.C. 310 at 324.

to be crimes, and the only common nature they will be found to posses is that they are prohibited by the State and that those who commit them are punished.

This statement must be construed in relation to its context and the legislation under consideration. It was there the Combines Investigation Act (R.S.C. 1927, ch. 26) under which the combines affected are defined as those "which have operated or are likely to operate to the detriment or against the interest of the public," or as Lord Atkin stated, at p. 323 (Plaxton p. 65): "The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit." In 1937 Lord Atkin in *A.-G. for B.C.* v. *A.-G. for Canada (Sec. 498A of the Cr. Code),* (1) referred to his judgment in *Proprietary Articles Case* in these words:

> The basis of that decision is that there is no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal.

In both of these cases the legislation was held to be competently enacted under sec. 91(27). While in the latter "intent to do wrong" and that all of the public be immediately affected were negatived as essentials to the constitution of a crime, both cases emphasize that Parliament in enacting criminal law is acting "in the public interest". This last phrase is significant in relation to the limitation suggested in both cases upon the power of the Parliament of Canada, which in the latter is expressed as follows:

> The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them.

See also *Toronto Electric Commissioners* v. *Snider, supra.*

The limitation here referred to is illustrated in *A.-G. for Canada* v. *A.-G. for Alberta (Dominion Insurance Act, 1910)* (2) and *A.-G. for Ontario* v. *Reciprocal Insurers* (3), where it was determined that legislation prohibiting the carrying on of certain types of insurance business without a licence from the Dominion was ultra vires the Dominion Parliament, whether or not the prohibition and penalty

(1) [1937] A.C. 368 at 375.
(2) (1916) 1 A.C. 588; 2 Cam. 63.
(3) [1924] A.C. 328; 2 Cam. 334.

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were contained in the insurance legislation itself or embodied in the Criminal Code. Speaking relative to the amendment to the Criminal Code in the *Reciprocal Insurers Case,* the Privy Council stated at p. 339 (2 Cam. 343):

> It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the Insurance Act, and their Lordships think it not open to controversy that in purpose and effect s. 508c is a measure regulating the exercise of civil rights.

And at p. 342 (2 Cam. 344):

> In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

These authorities emphasize again that secs. 91 and 92 must be read and construed together, and that it is the substance as distinguished from the form of the legislation that in each case must be considered. The legislation here in question does not disclose that the prohibitions were enacted "in the public interest" in the sense in which that phrase is used in the foregoing authorities. It rather appears that those in sec. 5(*a*) were, as well as many other prohibitions in the *Dairy Industry Act,* enacted for the purpose of protecting and regulating that industry. These prohibitions, as already stated, prevented citizens engaging in the manufacture and sale of these specified food products. As such the legislation is in relation to property and civil rights and therefore within the legislative competence of the provinces. Legislation so enacted is ultra vires the Dominion and it does not become intra vires by the inclusion therein of offences and penalties for the purpose of giving coercive and compulsory effect to its provisions. The enactment of such offences and penalties though in form criminal is not in relation to criminal law within the meaning of sec. 91(27) and is therefore not competent Dominion legislation under that heading. It was no doubt that the provinces might have the power to enact compulsory and coercive provisions and thereby give force and effect to

legislation enacted in relation to matters assigned to them that sec. 92(15) was included in the B.N.A. Act, which enabled the provinces to impose "punishment by fine, penalty, or imprisonment for enforcing any law of the province."

It was submitted that sec. 5(*a*) was competent Dominion legislation under the peace, order and good government clause of sec. 91, that while within the provisions of sec. 92 the provinces might prohibit manufacture and sale in a purely local matter "from a provincial point of view," the Dominion possessed in addition thereto a Dominion power to prohibit and thereby deal with such matters as inter-provincial trade. This contention appears to be answered by Duff, J. (later Chief Justice) in *The King* v. *Eastern Terminal Elevator Co.* (1) where he stated:

> The other fallacy is....that the Dominion has such power because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme. The authority arises, it is said, under the residuary clause because of the necessary limits of the provincial authority. This is precisely the view which was advanced in the *Board of Commerce Case,* (1922) 1 A.C. 191, and, indeed, is the view which was unsuccessfully put forward in the *Montreal Street Railway Case,* (1912) A.C. 333, where it was pointed out that in a system involving a division of powers such as that set up by the British North America Act, it may often be that subsidiary legislation by the provinces or by the Dominion is required to give full effect to some beneficial and necessary scheme of legislation not entirely within the powers of either.

Moreover, even if such a power of prohibition did exist, sec. 5(*a*) does not purport to be enacted in relation to inter-provincial trade or any aspect in relation to manufacture and sale other than a direct prohibition of the exercise of civil rights within the provinces.

Neither can this legislation be supported on the basis that it is for the protection of an industry that has attained "such dimensions" or is of such national concern as to give to the Dominion a jurisdiction to validly enact it under the peace, order and good government clause of sec. 91.

In the *Liquor License Case* (2), Lord Watson gave expression to the possibility of the Parliament of Canada enacting such legislation:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body

(1) [1925] S.C.R. 434 at 448.

(2) [1896] A.C. 348 at 361; 1 Cam. 481 at 492.

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politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest 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 or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

The nature and scope of such legislation was considered by Chief Justice Duff in the judgment of this Court in *Natural Products Marketing Act* (1) adopted and described by the Privy Council as the "*locus classicus* of the law" in *A.-G. for Canada* v. *A.-G. for Ontario (Labour Conventions Case)* (2). Chief Justice Duff commented upon the carefully guarded language of Lord Watson and reviewed the *Board of Commerce Case, supra,* and *Toronto Electric Commissioners* v. *Snider, supra.* In both of these the legislation was in respect of admittedly important matters that obtained throughout the Dominion and affected the people of Canada as a whole. In both of these cases it was contended that the legislation was valid under the peace, order and good government clause of sec. 91, yet the legislation in both was held by the Privy Council to be ultra vires the Parliament of Canada.

This Court held the *Natural Products Marketing Act,* 1934, ultra vires of the Dominion. Duff, C. J. C., at p. 426 stated:

> . . . this statute attempts and, indeed, professes, to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern.
>
> Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada...

This decision was affirmed by the Privy Council in *A.-G. for B.C.* v. *A.-G. for Canada* (3). It is of interest to note that the *Natural Products Marketing Act* contained a prohibition in the following language:

> 4. (1) (*a*) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be

(1) [1936] S.C.R. 398.
(2) [1937] A.C. 326.
(3) [1937] A.C. 377.

marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class.

In the Privy Council, as in this Court, it was emphasized that the *Natural Products Marketing Act* was beyond the legislative competence of the Dominion because, though it might affect provincial and export trade, it covered "transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade."

In *The King* v. *Eastern Terminal Elevator Co., supra* it was contended that the Grain Act was competent Dominion legislation under the peace, order and good government clause, both because it dealt with export trade and because no single province possessed the authority to deal adequately with the subject. Nevertheless, the legislation was held ultra vires the Dominion because it sought to regulate storage of grain in, and the business of operating elevators.

It would therefore appear that this industry cannot be classified as "unquestionably of Canadian interest and importance" as stated by Lord Watson in the *Liquor License Case, supra,* nor within the language of Viscount Haldane in the *Board of Commerce Case* (1):

> It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one.

Nor does it appear that the language of Viscount Simon in *A.-G. for Ontario* v. *Canada Temperance Federation* (2) in any way alters or affects the jurisdiction of the Parliament of Canada. Viscount Simon stated:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case) then it will fall within the com-

(1) (1922) 1 A.C. 191 at 197; 2 Cam. 253 at 258.

(2) [1946] A.C. 193 at 205.

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petence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

His reference to the *Aeronautics* and *Radio* cases, and the oft-quoted illustrations of war and pestilence, "the drink or drug traffic, or the carrying of arms," together with his express words: "Their Lordships have no intention, in deciding the present appeal, of embarking on a fresh disquisition as to relations between ss. 91 and 92 of the British North America Act . . .," clearly indicate that the Privy Council was laying down no new rule or principle in this judgment affirming the decision of *Russell* v. *The Queen* (1).

The importance of the dairy industry in the economy of Canada was not questioned. Nor were the statements to the effect that in the grazing season a surplus of milk is realized that must be disposed of in the manufacture of dairy products, that some provinces produce a surplus of butter while others must import a portion of their requirements. These, together with those factors of climate that make the conduct of this industry relatively expensive, are of themselves not sufficient in normal conditions to justify the conclusion that the dairy industry has attained "such dimensions" as to give it a Dominion aspect and thereby bring it within the legislative competence of the Parliament of Canada under the peace, order and good government clause of sec. 91 as interpreted by the foregoing authorities. If the dairy industry itself has not attained "such dimensions" as to give it a Dominion aspect, sec. 5 (*a*) cannot be accepted as competent Dominion legislation in relation thereto.

The Dairy Industry Act, apart from sec. 5(*a*), throughout the hearing of this reference has been accepted as competent Dominion public health legislation under the peace, order and good government clause of sec. 91. The products mentioned in sec. 5(*a*), particularly those to which our attention has been directed, being not injurious to health, that section cannot constitute valid public health legislation. It follows that in neither of these aspects can sec. 5(*a*) be accepted as competent Dominion legislation under the opening paragraph of sec. 91.

(1) (1881-82) 7 A.C. 829.

Nor can sec. 5(*a*) be accepted as legislation enacted by the Dominion "in relation to agriculture in all or any of the provinces" within the meaning of sec. 95 of the B.N.A. Act. As already stated, oleomargarine and margarine are vegetable oil compounds. Legislation with respect to their manufacture and sale is not legislation in relation to agriculture. In *Lower Mainland Dairy Products* v. *Crystal Dairy Ltd.* (1), the Province of British Columbia enacted legislation under which the sale of milk was regulated. The contention that this was legislation in relation to agriculture was not maintained because it did "not appear in any way to interfere with the agricultural operations of the farmers."

In *The King* v. *Eastern Terminal Elevator Co., supra,* it was contended that the legislation relative to the sale of grain was legislation in relation to agriculture. Mr. Justice Mignault disposed of this contention:

> ...the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade.

The prohibition of the importation, manufacture and sale of these manufactured food products might compete with or affect the sale of dairy products, but it does not interfere with the farmers in their agricultural operations within the meaning of sec. 95.

The prohibition of importation, unlike that of manufacture and sale, is not in relation to any of the matters assigned exclusively to the provinces. It is rather a matter of external trade in relation to which the Parliament of Canada possesses legislative authority under sec. 91 (2) "The regulation of Trade and Commerce."

> It would appear to result from these decisions that the regulation of trade and commerce.....does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers. Per Duff, C.J.C., in *Natural Products Marketing Act* (2).

The Parliament of Canada may also enact Customs Duties under sec. 91(3) "The raising of Money by any Mode or System of Taxation."

> The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries, or it

(1) [1933] A.C. 168.

(2) [1936] S.C.R. 398 at 410.

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may have the two-fold purpose of attempting to secure both ends; in either case it is a power reserved to the Dominion. Per Lord Buckmaster in *A.-G. of B.C.* v. *A.-G. of Canada* (1).

The attainment of the regulation of trade and commerce by the imposition of customs duties necessarily involves a restriction upon importation which increases as the duty is raised. The difference between the imposition of a duty and complete prohibition is therefore but one of degree rather than principle. The enactment of embargoes and prohibitions, the latter often included in customs legislation, has been a recognized practice in matters of external trade not only in this but in other countries. The Parliament of Canada in legislating under one of the enumerated heads or under the peace, order and good government clause of sec. 91 does so as "a fully sovereign state" and upon the basis of the principle underlying the decision of *Croft* v. *Dunphy* (2), Parliament possesses the power to enact such legislation under sec. 91(2).

The considerations that support a prohibition of importation for the regulation and protection of a native industry must often be quite different from those of manufacture and sale, even if both be effected toward the attainment of the same end. Each has a distinct and separate significance, the one affecting external the other domestic trade. In this particular case the vegetable oils which enter into the manufacture of oleomargarine and margarine are largely imported. Moreover, these manufactured products are produced in large quantities in other countries and when the legislation was suspended, as hereinbefore stated, a considerable quantity was imported.

Parliament in 1886 placed the prohibition of importation in the Customs Act (S. of C. 1886, ch. 37) where it has since remained with some amendments and is now found in sec. 214 of the Customs Tariff Act (R.S.C. 1927, ch. 44, Item 1204 of Sch. C). It was not until 1903 that the prohibition of importation was also included in The Butter Act (S. of C. 1903, ch. 6). When in the 1914 legislation supra the prohibition of margarine was enacted, and though not included in the Customs Tariff Act, it was for the attainment of the

(1) [1924] A.C. 222 at 225; 2 Cam. 331 at 333.

(2) [1933] A.C. 156.

same end and competent Dominion legislation under sec. 91(2). The foregoing indicates that not only has the prohibition of importation a separate and independent significance from that of manufacture and sale, but that to some extent Parliament has so regarded it. It is therefore but reasonable to assume that Parliament would have enacted a prohibition against importation even if it could not have competently included a prohibition against the manufacture and sale of these products. *Reference Re Alberta Bill of Rights* (1).

That legislation so enacted may affect matters assigned exclusively to the provinces does not constitute a valid objection unless it be determined that such is "colourable", as that word has been so often used. There appears to be no reason to so conclude in this instance. It would therefore appear that the prohibition of importation as enacted in sec. 5(*a*) is competent Dominion legislation.

My answer to the question submitted is that sec. 5(*a*) of the *Dairy Industry Act,* R.S.C. 1927, ch. 45, is intra vires the Parliament of Canada in so far as it prohibits the importation of the products mentioned, but ultra vires in so far as it prohibits the manufacture, sale, offering or having in possession for sale the specified products.

LOCKE, J.:—The first ground urged by counsel for the Dominion in support of the contention that section 5(*a*) of the *Dairy Industry Act,* cap. 45, R.S.C. 1927, is intra vires Parliament, is that it is legislation in relation to criminal law and thus reserved to Parliament by section 91 (27) of the *British North America Act.*

While the section prohibits, inter alia, the manufacture, importation into Canada or sale of margarine as well as oleomargarine, it is only the latter word that is defined by section 2. The definition is, however, sufficiently broad to include margarine which, according to the statement of facts contained in the order of reference, is a straight vegetable oil compound while oleomargarine contains in addition an animal fat. On the argument addressed to us emphasis was laid upon the fact that when the Act to prohibit the Manufacture and Sale of certain substitutes

(1) [1947] 4 D.L.R. 1 at 11.

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for Butter was enacted in 1886, the preamble recited that "the use of certain substitutes for butter heretofore manufactured and exposed for sale in Canada is injurious to health and it is expedient to prohibit the manufacture and sale thereof." This, it is said, affords a clear indication that the legislation as originally enacted was for the purpose of safeguarding the health of the public generally, and thus within a field where Parliament might act under heading 27 of section 91. It is said that the prohibition in the *Dairy Industry Act,* as it now stands, is in effect simply a reenactment of the original prohibition contained in the statute of 1886 and reliance is placed upon a passage in the judgment of Viscount Simon in *Attorney-General for Ontario* v. *Canada Temperance Federation* (1), wherein it was said:—

> It was not contended that if the Act of 1878 was valid when it was enacted it would have become invalid later on by a change of circumstances, but it was submitted that as that Act and the Act of 1886 have been repealed, the Act of 1927 was new legislation and consequently circumstances must exist in 1927 to support the new Act.

and again:—

> Their Lordships do not find it necessary to consider the true effect either of s. 5 or s. 8 of the Act of 1924 for the revision of the Statutes of Canada, for they cannot agree that if the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could be successfully contended that the Act of 1927 which replaced it was ultra vires.

We are informed by the statement of facts that both oleomargarine, being a product containing some animal fat, and margarine, a product made in part of vegetable oils and other healthful and harmless ingredients, are equally as nutritious as butter and it is common ground that neither is injurious to health. The recited statement in the preamble to chapter 42 of the Statutes of 1886 relating to oleomargarine is no longer true: as to margarine, the preamble did not refer to it or other products which did not contain animal fats, so that the contention which may be advanced in favour of the prohibition of the manufacture of oleomargarine has no relevancy to the position of the product margarine.

It cannot, in my opinion, be successfully contended that if the real purpose of the prohibition of the import-

(1) [1946] A.C. 193 at 207.

ation, manufacture or sale of these products was the protection of the general health of the public the Dominion might not properly legislate. There can now be no such purpose so that if the legislation in respect of oleomargarine is to be supported on that ground, it must be upon the basis that it is the validity of the prohibition as originally enacted in 1886 that we are to consider and that, in the absence of any evidence that oleomargarine containing animal fat was not injurious to the health at that time, it should be assumed that the prohibition contained in that statute was for the assigned purpose and, therefore, supportable as a valid exercise of the powers of Parliament. The above quoted statement in the judgment in the Canada Temperance Federation case is to be contrasted with that of Viscount Haldane in *Fort Frances Pulp and Paper Company* v. *Manitoba Free Press* (1), which appears to me to conflict with it. It may be noted that the judgment of the Judicial Committee in the Canada Temperance Federation case does not refer to the Manitoba Free Press case. I have come to the conclusion that this phase of the question is to be determined without regard to the legislation of 1886. When the Butter Act 1903 was enacted the prohibition, as contained in the statute and the Revised Statutes of 1886, was altered so that it read:—

> No person shall manufacture, import into Canada or offer, sell or have in his possession for sale any oleomargarine, butterine or other substitute for butter manufactured wholly or in part from any fat other than that of milk or cream.

and the Act contained no recital that butter substitutes so manufactured were injurious to health. The absence of any such recital or of any reference to the protection of the public health means, in my opinion, that by the year 1903 at least it was publicly recognized that oleomargarine, containing animal fat, was not harmful and that the prohibition could no longer be justified on that ground and the product was grouped with all other substitutes for butter and its importation and manufacture prohibited, for the purpose of protecting those engaged in the dairy industry. I think, therefore, that oleomargarine and margarine, which

(1) [1923] A.C. 695 at 706.

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was first mentioned by name when the Dairy Industry Act was enacted in 1914, are on the same footing and that the recital in the statute of 1886 does not affect the matter.

In *Proprietary Articles Trade Association* v. *Attorney-General of Canada,* (1), in considering whether the *Combines Investigation Act,* R.S.C. 1927, cap. 36, and section 498 of the Criminal Code were ultra vires the Parliament of Canada, Lord Atkin, approving what had been said theretofore in *Attorney-General for Ontario* v. *Hamilton Street Railway Company,* (2), that "criminal law" means the criminal law in its widest sense, said that criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state and that the criminal quality of an act can be discovered by a reference to one standard only, namely: is the act prohibited, with penal consequences. Here the manufacture, importation, selling or having in possession of oleomargarine and margarine are prohibited, with penal consequences. However, as pointed out in a later passage of the judgment "The contrast is with matters which are merely attempts to interfere with Provincial rights and are sought to be justified under the head of 'criminal law' colourably and merely in aid of what is in substance an encroachment", this being the ground upon which the Board had acted in the *Board of Commerce Act case* (3). The fact that Parliament has declared that the manufacture, importation and sale of a healthful, nutritious food is a crime, does not relieve us of the necessity of inquiring into the real nature of this legislation. The determination of that question does not turn on the language used by Parliament but on the provisions of the Imperial Statute of 1867 *(Union Colliery Company* v. *Bryden* (4): *Attorney-General for Manitoba* v. *Attorney-General for Canada,* (5). It may be observed that if it is within the power of the Dominion to prohibit the manufacture and sale of this valuable and harmless article of food in the provinces of Canada by the simple expedient of declaring these acts to be criminal offences, Parliament might with equal force

(1) [1931] A.C. 310 at 324.
(2) [1903] A.C. 524.
(3) (1922) 1 A.C. 191.
(4) [1899] A.C. 580 at 587.
(5) [1925] A.C. 561.

prohibit the production and sale of milk or the keeping of cattle or the growing of wheat or the manufacture of flour. In my opinion, this is not in pith and substance criminal legislation and if it cannot be supported on other grounds, to sustain it as such would be to permit the Dominion to invoke heading 27 of section 91 in aid of a clear encroachment upon the Provincial field.

Counsel for the Dominion further argued that the legislation may be supported under heading 2 of section 91 as being legislation for the regulation of trade and commerce. In the *Reference re Natural Products Market Act* 1934 (1), Sir Lyman Duff, C.J., after summarizing the authorities said that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers. In that case the Act under consideration provided for the establishment of a Dominion Marketing Board to regulate the marketing of specified natural products. By sec. 4 (1) the Board was invested with power

> (*a*) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class.

and the word "marketed" was defined as embracing "buying and selling, shipping for sale or storage and offering for sale." As in the present case, the legislation admittedly affected civil rights and interfered with, controlled and regulated the exercise in every one of the provinces of the civil rights of the people. In support of the legislation it was contended that it was within the competence of Parliament, not only upon the ground that it was legislation for the regulation of trade and commerce, but also that it was

(1) [1936] S.C.R. 398.

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competent under the general authority "to make laws for the peace, order and good government of Canada", within the introductory clause of section 91. In the judgment finding against both of these contentions, the learned Chief Justice pointed out that the statute attempted to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities; that the powers of regulation vested in the commissions extended to external trade and matters connected therewith and to trade in matters of interprovincial concern but also to trade which was entirely local and of purely local concern and that the regulation of individual trades and trades in individual commodities in this sweeping fashion was not competent to Parliament. In my opinion, this decision which was confirmed on appeal (1) is conclusive upon this aspect of the present case. I can see no sound distinction between a statute which prohibits or regulates the buying, selling or offering for sale of a natural product and one which assumes to prohibit the manufacture of articles of food from a natural product. Apart from precedent, it is my opinion that it was never contemplated by the scheme of Confederation that Parliament should in a matter which is so largely of a local or private nature interfere with the property and civil rights of the inhabitants of the various provinces. At the present time it is common ground that, due to circumstances quite beyond the control either of the Dominion or Provincial governments, the price of butter is high and there is a scarcity. The scarcity differs in the different provinces of Canada: in some, more butter is manufactured than is required for local use, while in others the reverse is the case. The growing of soya beans, sunflowers and other natural products used in the manufacture of vegetable oils affords to the residents of the provinces what is, at least in Canada, a comparatively new source of income which the legislatures of the various provinces may well consider to be for the benefit of the people and to contribute to the welfare of the province, while the manufacture and sale of oleomargarine, margarine and other like products would undoubt-

(1) [1937] A.C. 377.

edly be of advantage as contributing to employment. These are all matters which I think to be essentially of a nature which it was intended to commit to the various legislatures rather than to Parliament. The growing of these crops, the production of vegetable oil from them and its use in the manufacture of food are, in my opinion, matters of a merely local or private nature in the province and beyond the jurisdiction of Parliament.

It is further contended that the legislation may be supported as being in relation to agriculture. The same might be said in regard to the *Natural Products Marketing Act of 1934* and I think it cannot be upheld on this ground. In dealing with the same contention in *The King* v. *Eastern Terminal Elevator Company,* (1) Mignault J. said that the subject matter of the Act was not agriculture but a product of agriculture considered as a matter of trade. Here the product dealt with is one step farther removed, being a manufactured article made largely from a product of agriculture.

There remains for consideration the question as to whether the section, in so far as it prohibits the importation into Canada of these products, can be supported. It is relevant to this aspect of the matter to note that by the Customs Duties Act amendment, cap. 47, Statutes of 1886, s. 5, s-s. (*b*) "oleomargarine, butterine and all such substitutes for butter" were added to the list of articles the importation of which into Canada was prohibited by the Customs and Excise Act, cap. 15, Statutes of 1879, Schedule D. By sec. 5, cap. 33, R.S.C. 1886, the prohibition was amended to read: "oleomargarine, butterine or other similar substitute for butter". The articles prohibited were not in terms restricted to those "manufactured from any animal substance other than milk" as in cap. 42, Statutes of 1886, sec. 1. The prohibition in so far as it dealt with substitutes for butter was continued in this form in the Customs Tariff Act 1894, cap. 33, sec. 6, Schedule C, in the Customs Act 1897 and in the Revision of the Statutes, cap. 49, R.S.C. 1906. Later there was added to the prohibition "process butter or renovated butter" and it is in these terms that it now forms part of that Act. Margarine, as distinct from

(1) [1925] S.C.R. 434 at 457.

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oleomargarine, which was first mentioned in the Dairy Industry Act in 1914, is not named as a prohibited article in the Customs Tariff Act but the wording of the prohibition is, in my opinion, wide enough to cover it. The question as to the right of the Dominion to prohibit importation was not fully argued before us. On behalf of l'Association Canadienne des Electrices it was contended that, if the restriction was enacted solely for the purpose of encroaching upon the rights of the province in regard to property and civil rights, it was invalid. The prohibition cannot, I think, be justified under heading 2 of section 91 as a regulation of trade and commerce, in view of the decisions of the Judicial Committee in *Municipal Corporation of Toronto* v. *Virgo*, (1) and in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). Where, however, the subject matter of any legislation is not within any of the enumerated heads either of s. 91 or s. 92, it has been said that the sole power rests with the Dominion under the preliminary words of s. 91 relative to "laws for the peace, order and good government of Canada" (*Attorney-General for Alberta* v. *Attorney-General for Canada*, (3)). If it be assumed for the purpose of argument that the power to prohibit importation of oleomargarine and margarine rests with the Dominion, this is not, I think, decisive of the matter since it is not that question alone which is to be considered here but whether it can be assumed that Parliament would have enacted the prohibition in section 5(*a*) had it been aware that the prohibition of manufacturing, offering, selling or having in possession for sale, was beyond its powers (*Reference re The Grain Futures Taxation Act*, (4): *Attorney-General for Manitoba* v. *Attorney-General for Canada*, (5)). I am unable to discover in the language of the section or in the context anything showing an intention to pass such a prohibition divorced from the other prohibitions of the section. To enact such a prohibition of importation in the *Dairy Industry Act* apart from the other prohibitions would, it appears to me, be pointless in view of the existing prohibition in the Customs Tariff Act. I think it may also be said that the prohibition of importation in

(1) [1896] A.C. 88 at 93.
(2) [1896] A.C. 348 at 363.
(3) [1943] A.C. 356 at 371.
(4) [1924] S.C.R. 317 at 323.
(5) [1925] A.C. 561 at 568.

the section is merely ancillary to the main prohibitions contained in it and as they are beyond the powers of Parliament the prohibition of importation must fall with the rest (*Attorney-General for British Columbia* v. *Attorney-General for Canada*, (1)).

My answer to the question, therefore, is:—

Section 5(*a*) of *The Dairy Industry Act*, R.S.C. 1927, cap. 45, is ultra vires the Parliament of Canada.

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